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# NAMES OF REPORTERS.

## Original Side.

CHARLES W. L. JACKSON, B.A., Barrister-at-Law.

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Vol. XI
1860.5

## Appellate Side.

KHANDERA'V CHIMANRA'V BEDARKAR, B.A., LL.B.

VISHNU GHANASHA'M, Vakil, High Court.

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2

# JUDGES OF THE HIGH COURT OF BOMBAY

## 1874.

---

The *Honourable* Sir Michael Roberts Westropp, Kt., C. J.

The *Honourable* James Gibbs, C.S.

The *Honourable* Sir Charles Sargent, Kt.

The *Honourable* Lyttelton Holyoake Bayley.

The *Honourable* Maxwell Melvill, C.S.

The *Honourable* Charles Gurdon Kemball, C.S.

The *Honourable* J. P. Green.

The *Honourable* Raymond West.

The *Honourable* Robert Hill Pinhey.

The *Honourable* John Marriott.

The *Honourable* Nánábhái Haridás.

The *Honourable* Baron De H. Larpent.

### ADVOCATE GENERAL.

The *Honourable* Andrew Richard Scoble.

### LEGAL REMEMBRANCER.

The *Honourable* C. J. Mayhew.

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# CASES

DECIDED IN THE

# HIGH COURT OF BOMBAY.

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[APPELLATE CIVIL JURISDICTION.]

*Regular Appeal No.* 58 *of* 1873.

BHUJANG MAHA'DEV .....*Plaintiff and Appellant.*

COLLECTOR OF BELGAUM AND ANOTHER *et al.* ...*Defendants and Respondents.*

1874. January 23.

*Collector—Assessment—Government Order—Limitation in a suit claiming exemption from assessment on land—Arrears—Act XIV. of* 1859, *Sec.* 1, *cls.* 4 *and* 12.

Where a person, claiming to hold land free of Government assessment, was compelled by the Collector to pay the same, and afterwards brought his suit to establish his right :—

*Held*, that the cause of action first arose and the right was actually interfered with by the Collector compelling payment of the rent ; and that as the suit was brought within 12 years from that date, it was not barred; but that only one year's arrears was recoverable under Act XIV. of 1859, Sec. 1, cl. 4.

THIS was an appeal from the decision of C. F. H. Shaw, District Judge of Belgaum, in Original Suit No. 3 of 1870.

The plaintiff, Bhujang, sued for a declaration, declaring him entitled to enjoy the produce of certain *Inám* land in the Taluka of Parasgur, free from the payment of assessment, and alleged his cause of action to have arisen on the 15th December 1858, on which day he was compelled by the Collector of Belgaum to pay assessment on the land. The Collector, among other objections, pleaded the Statute of Limitation. The District Judge held the plaintiff's claim

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BHUJANG MAHA'DEV v. COLLECTOR OF BELGAUM, &c.

barred, on the ground that the Government order, making the land in dispute *Khálsá* and liable to pay assessment, was dated the 1st May 1858, and that, therefore, limitation began to run from that date and not from the 15th December 1858, on which day the plaintiff paid the first instalment of the assessment demanded by the Collector.

The appeal was argued before MELVILL and WEST, J.J., on the 23rd January 1874.

*Ganpatráv Bháskar* for the appellant.

*Dhirajlal Mathurádás* (Government Pleader) *contra*.

PER CURIAM: —We think that the plaintiff in this case seeks to recover an interest in immoveable property, viz., the capacity to take its proceeds free from deduction on account of assessment, and that his cause of action first arose when that capacity was actually interfered with. This was when the Collector entered into possession by exercise of an alleged right in derogation of, and forming a deduction from, the right set up by the plaintiff. Such possession, in the case of a share of the produce of the soil, or of the rent, must be counted from the first occasion on which the Collector took or compelled payment to him of the rent which the plaintiff avers was not due, that is, from the payment to him of the first instalment, in accordance with his order to that effect in December 1858. The suit was brought within twelve years from that time, and was not barred in so far as the establishment of the right and the recovery of its exercise by the plaintiff were concerned, though but one year's arrears can be recovered under Act XIV. of 1859, Sec. 1, cl. 4 on his proving his case. Decree reversed and cause remanded for re-trial and a new decree on merits. Costs to follow the final decision.

[APPELLATE CRIMINAL JURISDICTION.] 1874. February 19.

REG. v. BHAVA'NISHANKAR *et al*.....

*Forgery—Intention to defraud—Wrongful gain or wrongful loss—Avoidance of litigation no fraud on the Stamp Revenue.*

*A* signed *B's* name to petitions presented by *C* to the Mámlatdár, requesting his summary assistance, under Regulation 17 of 1827, for the recovery of rents from *B's* tenants.

*Held* that even if *A* had no authority from *B* to sign his name, and if *A* wished to deceive the Mámlatdár into the belief that it was *B* himself who had signed the petitions, still, if there had been no intention to defraud anybody, or if no wrongful gain or wrongful loss could have been caused to *A* or *B*, *A's* act did not constitute forgery within the meaning of the Indian Penal Code.

Avoidance of litigation is no wrongful loss to Government.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction.

The accused, Bhaváníshankar, was charged with having committed the offence of forgery and of fraudulently using, as genuine, forged documents, and the other accused, with having abetted the offence of fraudulently using, as genuine, forged documents, and of intentionally giving false information to a public servant, &c. The case was tried before J. W. Walker, Acting Assistant Session Judge of Ahmedabad, who sentenced the first prisoner to one year's rigorous imprisonment, and the second to nine months on each head. The prisoners appealed to the Session Judge, who upheld the conviction, but reduced the sentence of imprisonment on each head to six months against the first prisoner, and to three months against the second prisoner.

The facts, in so far as they are material, are as follows:—

The first accused, Bhaváníshankar, was the manager of an estate farmed by one Dalsukhrám Hargovan from the Koth Darbár. The second accused was a peon whose duty it was to act under the orders of the first. Rents due from thirty-two tenants on the estate falling into arrears, petitions bearing Dalsukhrám's signature in the handwriting of Bhaváníshankar were presented to the Mámlatdár, requesting his sum

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mary assistance under Regulation XVII. of 1827. The signature on each of them was made exactly as it would have been made by Dalsukhrám himself, and the petitions were lodged on the last day they could have been lodged.

The effect of the evidence for the prosecution was that Bhavánishankar had no authority from Dalsukhrám to sign his name, although Dalsukhrám himself deposed to the contrary, that he, Bhavánishankar, intended to deceive the Mámlatdár into the belief that Dalsukhrám, and not he, was the real signer of the petitions, and that if Bhavánishankar had not lodged the petitions on the day he did, Dalsukhrám would have been compelled to file regular suits in the civil court for the recovery of the rents due to him.

The Session Judge found it proved on the evidence that Bhavánishankar unauthorizedly signed Dalsukhrám's name intending to deceive the Mámlatdár. He argued that the prisoner intended to cause wrongful gain to his master, and corresponding wrongful loss to Government, who would have got their Stamp revenue if regular suits had had to be filed in the civil courts. The prisoner's intention was therefore dishonest.

The application was heard by MELVILL and NA'NA'BHA'I HA'RIDA'S, J J

*Taylor* (with him *Jefferson and Payne*) for the appellants.

*Dhirajlál Mathurádás*, Government Pleader, for the Crown.

PER CURIAM:—We think that this prosecution was instituted, at all events, against the first prisoner, without any sufficient grounds, and that his act cannot, without an extreme straining of the law, be brought within the definition of forgery.

There can be no question, but that, if the first prisoner had Dalsukhrám's authority to present petitions in his name, or *bonâ fide* believed that he had such authority, he was not guilty of forgery. Dalsukhrám was called for the prosecu-

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REG. v. BHAVA'NI-SHANKAR.

tion to prove that the prisoner had no such authority. He, however, gave evidence in favour of the prisoner; but, although there was no evidence to contradict him, the Sessions Court refused to give to the prisoner the benefit of his testimony.

It seems to us that the prosecution was bound to show that the prisoner acted without Dalsukhrám's authority, and that it has given no evidence whatever to prove this.

But, even assuming that the prisoner had no authority, he cannot be found guilty, unless he signed the petitions "dishonestly or fraudulently (*a*)." The Assistant Session Judge considered that the mere intention to deceive the Mámlatdár was sufficient to make the act fraudulent within the meaning of that section. We do not think that this is so. As said by CRESSWELL, J., in *Reg.* v. *Marcus* (*b*), in order to constitute in point of law an intent to defraud, there must be a possibility of some person being defrauded by the forgery, or, as he explains his meaning, in his subsequent remarks, there must be a possibility of some person being not only deceived but injured by the forgery. The Sessions Judge seems to have been sensible of the necessity of finding that there was an intention to cause wrongful gain or wrongful loss to some person. It could not be held that any wrongful gain or loss could have been caused to the prisoner or to Dalsukhrám. The act was done for the benefit of Dalsukhrám, but it is not suggested that he was not legally entitled to the rents which it was the prisoner's object to recover from the tenants. But the Session Judge argued that, if the petitions had not been received and acted upon, Dalsukhrám would have been obliged to sue his tenants in a civil court, and that consequently the Government have been defrauded of the Stamp revenue which would have been paid in the suit. It is sufficient for us to say that we are not disposed to regard litigation as a machinery invented for the benefit of the revenue, or to consider that avoidance of litigation is a wrongful loss to the Government within the meaning of the Penal Code, or in any other sense.

(*a*) Indian Penal Code, s. 464. (*b*) 2 C. & 356.

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We reverse the conviction and sentence on the first prisoner and the conviction and sentence passed upon the second prisoner under Sections 471 and 109 of the Indian Penal Code. On the facts found by the Courts below, we cannot interfere with the conviction recorded against the second prisoner under Section 182 of the Indian Penal Code, but we remit so much of the sentence as has not been already undergone.

*Order accordingly.*

---

APPELLATE CIVIL JURISDICTION.

January 21.

*Special Appeal No.* 468 *of* 1872.

VITHAL KRISHNA JOSHI.....*Plaintiff and Appellant.*

ANANT RA'MCHANDRA .....*Defendant and Respondent.*

*Village Priest—Disturbance of office—Fees, action for loss of.*

A suit for damages may be brought by a person holding the office of village priest by prescription against an intruder who deprives him of the exercise and benefits of that office.

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge at Ratnagiri, reversing the decree of the Subordinate Judge of Malwan.

Vithal Krishna Joshi brought this suit against Anant Rámchandra to establish his right to a half share in the *Joshipan* and *Bhatpan Watan* in the village of Rede and to recover profits wrongfully received by the defendant. Anant Rámchandra denied the plaintiff's right to the alleged half share in the *Watan*. The Subordinate Judge held the plaintiff's right to be a half sharer in the *Watan* proved, but rejected his claim to the profits. In appeal, the Assistant Judge reversed his decree and threw out the plaintiff's claim, on the ground of his failure to show that the defendant was under any obligation not to officiate as a priest in the village of Rede.

In special appeal, it was contended for the plaintiff, that, as he claimed an exclusive right to officiate as a priest in the village of Rede, and as his claim was quite in accordance with the custom of the country and the rulings of the Hig

Court, the lower court was wrong in throwing out his claim, on the ground, that he (plaintiff) did not show any contract on the part of the defendant not to officiate in the village.

The special appeal was argued before WESTROPP, C. J., and WEST, J.

*Bhairavnáth Mangesh* for the appellant.

*Ghanáshám Nilkantha* for the respondent.

WEST, J. :—The plaintiff, in this case, sued for damages on the ground that the defendant had officiated as a village priest at Rede, in the Ratnagiri District, and taken the fees, whereas the right belonged solely to the plaintiff and his family, of which the defendant was not a member. The Subordinate Judge found that the plaintiff had established his title as a half-sharer in the office and its emoluments to the exclusion of the defendant, and awarded him enjoyment without interference; but he threw out the claim for damages, because it was not proved how much the defendant had made by his intrusion. On appeal, the Assistant Judge wholly rejected the plaintiff's claim, on the ground, that "it is not shown nor alleged that the defendant ever bound himself by any contract not to officiate in the village." This judgment he fortified by reference to a previous one, in which a lessee of the office from the plaintiff had brought a similar suit against the defendant without success.

It does not appear to us that the proposition involved in the Assistant Judge's decision, is one that can be sustained as a general principle of law. Where an office is instituted for the benefit or convenience of the community, the person who holds the office, by legal appointment or prescription, may obtain damages for any usurpation which deprives him of the exercise and the profits of that office. This is established by the Kázi's case, *Muhammad Yusuf* v. *Syad Ahmed* (*a*), and the authorities there referred to, which show both, that in the circumstances supposed, customary fees may be demanded for services rendered, and that, where an action on this ground could be maintained against the persons benefited, a person wrongly taking the fees may be made to hand them over to the office-holder. It is only necessary to add

(*a*) 1 Bom. H. C. Rep. App. xviii

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to the doctrines there laid down, that the fees payable to an office-holder need not be of a fixed, but may be of a reasonable, amount, as ruled in *Bryant* v. *Foot* (*b*). And if the right subsists, an infringement of it is equally a wrong and equally actionable, whether the wrong-doer has agreed to respect it or not.

The office of village priest seems to have been uniformly considered as one to be regarded as of benefit to the Hindu community, and as thus giving to its legal holder a claim to protection and relief against any invasion of his privileges. In *Mooljee Purseram* v. *Nagur Ramjee* (*c*) it was ruled that the priest of the Katchya sect, in a particular division of the city of Surat, could recover damages both from the priest who had wrongly officiated at a marriage, and from the person who had employed him. This ruling was confirmed in the case of *Muncharam Shunkaram* v. *Umba Pragjee* (*d*) which recognized the obligation of the "Yajman" not only to pay his *Kulyan*, the fee for the "Shrimat" ceremony, but to employ him in performing it. In the subsequent case of *Pandoorung Succaram* v. *Balumbhut* (*e*), the plaintiffs sued as village "joshis" for fees due on a marriage. Of the numerous ceremonies proper to such an occasion, it appeared that eighteen had been performed. The defendants admitted that the plaintiffs were entitled to fees on eight of these; for the remainder they contended that nothing was due as they had been performed, not by the plaintiffs but by the defendants' family priest or *Upádhyá*; but as the rites had been performed, the Sudder Court awarded payment of the fees or of a sum in default, though, as the amount of the fee in each instance was declared optional, it was left open to the defendants to escape the effect of the decree by a nominal compliance with it.

In the case of *Krishnumbhut* v. *Anunt* (*f*), a similar question came under consideration, and the Sudder Court, in disposing of the appeal, said: "The rule of the Court has

(*b*) L. R. 3 Q. B. 497, 508.
(*c*) Sel. Cases, Bom. 131.
(*d*) Ibid 181.
(*e*) Ibid 196.
(*f*) 4 Morr. 111.

consistently been that certain ceremonies are optional; but that when these or other obligatory ceremonies have been performed, the person entitled of hereditary right to perform them is entitled to be paid his fee, whether he perform them or not." The decree of the Court was, that the respondents, who had employed another priest, should pay to the appellant the same amount by way of fees as they had previously paid to the person actually employed. By this payment, it seems to have been considered, the defendants had practically shown what, in their own opinion, it was right and reasonable for them to pay. And in the case of *Ramchunder Bapoojee* v. *Ramchunder Lukshmun* (*g*), the Judges say they consider "the remarks, that a Brahman may employ whom he likes as his *Upádhyá*, is opposed to the custom of the country," though, as in the particular case, the plaintiff's right was not proved, the decision of the Court below in favour of the defendants was not interfered with.

Of the cases decided since the establishment of the High Court, the most important for the purposes of the present appeal are Special Appeals 368 of 1869, and 291 of 1872. In the former of these, *Sítárámbhat* v. *Sítárám Ganesh* (*h*), Couch, C.J., says "It is settled law, that if a person usurps the office of another, and receives the fees of the office, he is bound to account to the rightful owner for them. Where the payments are merely voluntary, the case is different, and no suit can be brought. * * * The parties who have wrongfully received the fees are liable to pay them over to the parties entitled to them." But as the plaintiff had not been properly represented in the cause, the claim was rejected. In the recent case, Special Appeal 291 of 1872, however, a *Grám-upádhyá*, holding under a *sanad* from the Peshwa, was held to have a good cause of action against the *Yajmáns* who had employed another *Bhat*, but none against the *Bhat*, whose employment by the villagers had been purely voluntary. It

(*g*) 9 Harr. 537.
6 Bom. H. C. Rep. A. C. J., 250.

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is clear that he could not be entitled to recover from both, and that if he obtained a decree against the *Yajmáns*, he could not obtain one against his rival *Bhat* also.

The result of the cases appears to be that the office of a village priest is one which may well be established by grant or prescription, and that if a person, not entitled, assumes to act in the office and receives the fees, he may be made to refund them. The case last cited and some of the cases in the Sudder Adawlut seem to lend support also to the proposition that the villagers employing a priest independently of his character as *Grám-upádhyá*, or *Joshi*, must, if they have ceremonies performed in which the office-holder ought to take part, pay the fees, whether they employ him or not; but this is a point not arising for disposal in the present case, and on which we do not intend to express any opinion. The employment of a *Kazi*, it was said in the *Kazi's case* already referred to, is not compulsory; but those, who desire to employ a *Kazi*, cannot set up one of their own, and yet the remedy was given to the plaintiff against the intruding *Kazi*. In many cases, though the payment of a fee is compulsory, yet, according to the Hindu law, the amount appears to be optional. None of the English decisions go to the length of saying, that where the payment to be made depends solely on the good will or conscientiousness of the donor to whom the service is rendered, an action can be maintained against an intruder who has received what that law regards as a mere gratuity; but the rule may be quite different where, as under the Hindu system, though the amount of the priest's fee is left to the conscience and the means of the person for whom his functions are performed, yet the payment of some fee is regarded as essential to the efficacy of the ceremonies performed. However difficult, therefore, it may be for a village priest to sue with effect a *Yajmán* who cannot be ordered to pay any definite amount, yet when the suit is brought against a usurper of his office, it cannot be but that the office-holder has suffered to some extent by the intrusion. What the

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damage sustained has been is a matter for computation according to the circumstances of each case; but as there has in such a case been an undoubted injury, the law will not refuse a remedy merely because its amount in money does not admit of precise estimation.

In the present case, the suit is brought only against an alleged intruder into the office of village priest. If the plaintiff establishes that the office exists, that he is sole or part holder of it, that there are emoluments attached to it, and that the defendant has, without right, acted in the office and received the emoluments or some of them, he is entitled to damages for the intrusion. We, therefore, reverse the decree of the Assistant Judge, and remand the cause for retrial, and a new decree on the merits. Costs to follow the final decision.

*Decree reversed and suit remanded.*

February 19.

[APPELLATE CRIMINAL JURISDICTION.]

## REG. *v.* JIBHA'I VAJA'.

*Giving false evidence—Non-judicial Proceeding—Power to administer oath.*

In a non-judicial proceeding, the object of which is to discover the writer of a scandalous petition, it is not competent for the Magistrate conducting the proceeding to administer an oath.

The High Court reversed a conviction for giving false evidence where an oath was administered under the above circumstances.

THIS case, in which the accused was convicted of giving intentionally false evidence in a non-judicial proceeding, was called for on an examination of the Magisterial Criminal Return of the District of Kaira for September 1873.

The facts of the case, in so far as they are material, are as follows:—

The accused Jibhái was alleged to have taken part in a petition to the District Magistrate of Kaira, Mr. Propert, in the matter of the nomination of a Mukhi Pátil by Mr. Sheppard, the predecessor of Mr. Propert, in which petition remarks were made about Mr. Sheppard, which Mr. Propert

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considered scandalous. Jibhái was called up before Mr. Propert and was examined on solemn affirmation as to who the writer of the petition was, and whether it bore his signature. Mr. Propert, considering the evidence of Jibhái to be false, tried and convicted him of the offence of giving false evidence in a non-judicial proceeding. This conviction wa set aside by the Sessions Judge on the ground of want of jurisdiction in Mr. Propert, in contempt of whose authority Jibhái's offence was alleged to have been committed. The case subsequently came on before Mr. Grant, who found him guilty of the offence of intentionally giving false evidence in a non-judicial proceeding, and sentenced him to one month's rigorous imprisonment, under Section 193 of the Indian Penal Code.

The review was made by MELVILL and NA'NA'BHA'I HARIDA'S, JJ

PER CURIAM:—It appears that the object of the proceedings, in which the false evidance was given, was to discover and bring to punishment two persons who had made a scandalous petition against a former Magistrate, and that Jibhái, being one of those persons, was examined on solemn affirmation. The Court thinks that it was not competent to the Magistrate, under these circumstances, to administer an oath to Jibhái. And on this ground reverses the conviction and sentence.

*Conviction and sentence reversed.*

[APPELLATE CRIMINAL JURISDICTION.]

1874. February 12.

# REG. *v.* DOD BASAYA' and another.

*Cumulative sentence—Single act and intention—Indian Penal Code, Sections 435 and 436.*

Where the act of an accused person, coupled with his intention or knowledge, constitutes a graver offence, the circumstance that the same act also answers to the definition of another less grave offence, does not render him liable to a cumulative punishment.

Case where different statutes provide separate punishments for the same act, distinguished.

THE accused persons were tried by C. F. H. Shaw, Session Judge of Belgaum, for having climbed on to the roof of a warehouse and set fire to it, with the intention of destroying it with the goods therein stored. The Judge found them guilty, first, under Section 436 of the Indian Penal Code, of mischief in destroying a building used for the custody of property, and sentenced them to seven years' rigorous imprisonment; and, secondly, under Section 435, of mischief causing damage to property to the amount of upwards of Rs. 100, and sentenced them to three years' additional rigorous imprisonment.

The appeal was heard by WEST and NA'NA'BHA'I HA'RIDA'S, JJ.

*Ghanashám Nilkanth*, after commenting on the evidence, argued:—The Legislature in the Indian Penal Code has classified the offences into cognate groups, generally placing the lightest of them at the head, then the more serious ones following it in the order of gravity, and the most heinous of the group at the end, and providing for each offence a suitable penalty. It does not intend that the person who commits the gravest offence should also be subjected to the punishments provided for the minor offences. A double sentence for an offence founded on a single intention should not be sustained. The intention of the accused persons in this case was to destroy the warehouse along with what it contained. There was not one intention to destroy the building, and a second one to destroy the goods.

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*Dhirajlál Mathurádás*, Government Pleader, *contra* :— The act of the accused met the requirements of two different sections, and the Judge was right in awarding punishment provided under each. There is nothing to make this course illegal.

WEST, J., in delivering the judgment of the Court, said :—

The prisoners have been convicted by the Session Judge of Belgaum of the offence of committing mischief by fire, with intent to destroy a warehouse, under Section 436 of the Indian Penal Code, and of the offence of mischief by fire with intent to cause damage to property of the amount of Rs. 100 and upwards, under Section 435 of the Code. They have been sentenced to seven years' rigorous imprisonment for the former and to three years for the latter offence.

It has been contended by Mr. Ghanashám Nilkanth, on behalf of the appellants, that a double sentence for an offence, founded upon a single act, could not be maintained.

Section 426 of the Indian Penal Code provides punishment for the offence of mischief generally. In the various sections which follow, aggravating circumstances are added and enhanced punishments provided to suit those circumstances. When one set of aggravating circumstances properly attaches to an act making it an offence, another set should not be applied to the same act, unless there be in the mind of the offender a wholly separate intention. In some English cases one act or set of acts of the accused person has been held punishable under two different statutes, and a double conviction and sentence have been sustained. In such cases, the intention of the Legislature is to guard two interests of different species and to prevent a person, who has offended against both, from escaping with a penalty provided for the defence of one only. The present is not such a case. The intention of the accused was solely to do one act, viz., to set fire to a warehouse; and the circumstance that the same act also answers to the definition of another and subordinate offence,

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does not render him liable to an additional punishment for it. Such a case seems to be contemplated by Section 454 of the Criminal Procedure Code, paragraph II. It is a general rule that when, in the same penal statute, there are two clauses applicable to the same act of an accused, the punishments are not to be regarded as cumulative, unless it be so expressly provided. The rule of only a single penalty for a single offence under the same law was distinctly recognised by the Roman Law (Pothier Pand Lib. XLVIII. Tit. XIX. 59, Dig. fr. 41) and has been followed in many cases under the English law (*a*). The observation of LUSH, J., in *Berry* v. *Henderson* (*b*), implies that separate penal provisions in the same enactment are not to be understood as cumulative, unless it be so provided. While, therefore, we sustain the conviction on the graver of the two charges—the one under Section 436—we must reverse the conviction and sentence on the minor one under Section 435.

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[APPELLATE CIVIL JURISDICTION.]

*Miscellaneous Regular Appeal No.* 3 *of* 1873.

January 9.

KRISHNARA'V VENKATESH .....*Appellant.*

VA'SUDEV ANANT.....*Respondent.*

*Act VIII. of* 1859, *Section* 256—*Meaning of term "Applicant"—Jurisdiction—Attaching creditor—Appeal to High Court—Amount.*

A puisne attaching judgment-creditor for a sum under Rs. 5,000 applied to a Subordinate Judge, under Sec. 256 of the Civil Procedure Code, to have a sale, made in a suit brought in his Court by a senior attaching judgment-creditor, for a sum above Rs. 5,000, set aside. The application was refused on the ground of want of jurisdiction, as the applicant was not a party to the suit; and the sale was accordingly confirmed.

On regular appeal to the High Court:—

*Held* that the term "applicant" in Sec. 256 is not confined to the parties to the suit, but also includes any person who has sustained substantial injury by reason of any material irregularity in publishing or conducting the sale.

(*a*) As in *Reg.* v. *Moodie*, 1 M. & R. 128. (*b*) L. R. 5 Q. B. 203.

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*Held also* that, although the applicant was creditor for a sum less than Rs. 5,000, still, as the sale took place in a suit for a sum above Rs. 5,000, an appeal lay to the High Court.

Some of the dicta in *Joge Narian Singh* v. *Bhugbano* (2 Calc. W. R. Mis. Rul. 13); *Luchmeput Singh Doorgur* v. *Mooktakashee Debia* (9 Ibid, Civ. Rul. 388) and *Rae Sitaram* v. *Balkrishna Tewaree* (1 S. D. A. Rep. 377, N. W. P.) referred to and dissented from.

THIS was a miscellaneous regular appeal from the order, in an execution matter, of Dayárám Mayárám, First Class Subordinate Judge of Belgaum.

Krishnaráv Venkatesh was a puisne attaching creditor, and applied to the Subordinate Civil Court of Belgaum, under Sec. 256 of Act VIII. of 1859, that a sale, made in execution of a decree held by the senior attaching creditor, Vásudev Anant, might be set aside. The Subordinate Judge framed the issue, whether the applicant was entitled to apply under the abovenamed section; he found it against Krishnaráv and rejected his application. He observed—

"I am unable to find any precedent governing this question, and I consider that the applicant is not entitled to make this application. I think the judgment-debtor and the decree-holder are the persons who can come under the category of persons who may sustain loss under a sale which can be disputed under Sec. 256. The applicant is another judgment-creditor of the defendant, and he must be considered a third party. The pleader for the plaintiff, who is the auction purchaser, asks the Court to refer to the notes of Mr. Nelson in his commentaries on the Civil Procedure Code, and I find that that author has expressed the same views (see page 548)."

The appeal was argued before WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J., on the 9th January 1874.

*Dhirajlal Mathuráldás* (Government Pleader) for the appellant.

*Bhairávnáth Mangesh* for the respondent.

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WESTROPP, C.J. :—An application was made to the Subordinate Judge by a puisne attaching judgment-creditor for Rs. 3,340 of the judgment-debtor, to have a sale, made in the suit of the senior attaching judgment-creditor for Rs. 5,031-14-0, set aside, under Sec. 256 of Civil Procedure Code, on the ground of serious irregularities: such as conducting the sale at the house of the judgment-debtor instead of at the place at which it was ordered to be made, and excluding intending bidders from the auction; and the sale of the property, alleged to be worth Rs. 2,000 per annum, under those circumstances of irregularity, to the senior attaching judgment-creditor himself for Rs. 1,200 only, a gross undervalue.

The Subordinate Judge held that Sec. 256 only applied to the immediate parties to the suit, in which the sale took place, and, therefore, that he had not jurisdiction. He accordingly refused to enter into a consideration of the merits of the case. The puisne attaching judgment-creditor has appealed to this Court. The respondent's pleader contends: 1*stly*, that the appeal lay to the District Judge and not here, the appellant's decree being for a sum under Rs. 5,000; and 2*ndly*, that Sec. 256 does not apply to a puisne attaching creditor, he being a third party. As to the first of those objections, we think that it cannot be sustained, inasmuch as the sale, sought to be set aside, took place in a suit for a sum exceeding Rs. 5,000, and as to the second objection, we see nothing in Sec. 256 which does exclude a third party who can show that he has sustained substantial injury, by reason of a material irregularity in publishing or conducting the sale. The word used in that Sec. is the "applicant," not the plaintiff or defendant, or the purchaser. The term "applicant" is a large one. The reason given by LOCH, J., in *Joge Narain Singh* v. *Bhugbano* (*a*), for holding that Secs. 256 and 257 apply "not to a third party, but to the judgment-debtor," viz., that he "alone is affected by any irregularity in publishing or con-

(*a*) 2 Calc. W. R. Misc. Apps. 13.

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ducting the sale," is unsustainable. If that dictum be right, even the judgment-creditor could not complain of an irregularity whereby the property may have been sold for half its value, and he himself left to a great extent unpaid. If there be several puisne attaching judgment-creditors, their claims may be sufficient wholly to exhaust any surplus which may be left after payment of the senior attaching judgment-creditor. In that case, the puisne attaching creditors would be the persons principally interested in an irregularity in conducting the sale. In the Calcutta case, the applicant was a purchaser, and SETON-KARR, J., dissented from the opinion of LOCH, J., and NORMAN, Officiating C.J. The facts in *Luchmeeput Singh Doogur* v. *Mooktakashee Debia* (*b*), are inapplicable to such a case as the present, and the dictum of the Court that Sec. 256 applies only to the judgment-debtor, went beyond the actual necessity of the case. The same remark seems to be applicable to the like dictum in *Rai Sita Rám* v. *Balkrishn Jewaree*, 1 S. D. A. Rep. 377, N. W. P. In none of those cases was the right of the puisne attaching judgment-creditors to apply under Sec. 256 so much as mooted. They are (as already observed) often as much as, if not more, interested in the surplus proceeds of the sale (see Sec. 271, Civil Procedure Code) than the judgment-debtor. We see nothing in Sec. 256 or 257 to exclude them. The word "party" in Sec. 257 does not appear to us to be necessarily confined to a party in the suit. It means, as indeed the Sec. in substance says, the person against whom the order has been made. It is quite unnecessary for us to go so far as to say that the two Calcutta cases and the Agra case, which we have mentioned, were incorrectly decided, and we do not express any opinion on that point, but we do not concur in some of the dicta, which accompanied those decisions. We reverse the order of the Subordinate Judge, and direct him to entertain the application of the appellant upon its merits. Costs to follow the final result.

(*b*) 9 Ibid Civ. R. 388.

1874.
February 20

[APPELLATE CIVIL JURISDICTION.]

*Miscellaneous Special Appeal No. 20 of 1873.*

CHHAGANLA'L NARBHERA'M.....*Appellant.*

JAMNA'DA'S MANCHHA'RA'M .....*Respondent.*

*The Code of Civil Procedure, Sec. 216—Execution of a decree—Notice.*

The Court, to which a decree is sent for execution by another Court, has the power to take the same steps, including the issue of a notice under Sec. 216 of the Code of Civil Procedure, which it could take in execution of its own decree.

THIS was a miscellaneous special appeal from the decision of W. H. Newnham, Judge of the District of Ahmedabad. The facts of the case appear from the following extract of his judgment:—

"Chhaganlál got a decree against Jamnádás on the original side, High Court, and presented an application for its execution, on March 17th, 1873, in the Court of the Subordinate Judge of Ahmedabad.

"Notice to show cause why the decree should not be executed was issued under Sec. 216, and a warrant of attachment and sale issued, but as the applicant did not pay the expense of publishing the sale, the matter was dropped and the attachment raised.

"On explanation by the applicant the Subordinate Judge found he was not to blame and in order to avoid needless loss to him held the former attachment to remain good and issued fresh proclamation for sale.

"The appellant urges thatthe action of the court was illegal, in issuing notice under Sec. 216, which was for the High Court to do, and in acting again on a *darkhást* which had been once shelved; whereas the applicant should have put in a fresh one; and the evidence he adduced was not trustworthy. The first point to be decided is whether there has been any illegality committed which vitiates the proceedings.

"The first illegality alleged is the issue of notice under Sec. 216 by the Subordinate Judge himself and appellant's Vakil refers to *Lálkuvarbái* v *Ghoel Shi*

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*Sarsangji* (*a*) in which Westropp, C.J., said 'that such notice could only be issued by the Court which made the decree.'

"On the other hand the respondent contends that this is only an *obiter dictum* and not a ruling, and refers to the Full Bench Calcutta Ruling in *Bagram* v. *Wise* (*b*) which is to the effect that the executing Court is competent to issue the notice as though the decree were one of its own.

"I should certainly be disposed to follow the latter ruling, the issue of notice being a necessary step towards the execution of the decree which is committed to the Court to which it is sent: but I think I am bound to defer to the view of the learned Chief Justice of this Presidency, which, although not part of a decision on that point, is most positively expressed. The notice then having been issued without jurisdiction, all subsequent proceedings towards executing the decree are void, and on this ground the Subordinate Judge's order must be reversed with costs on respondent."

On the merits of the case, however, the District Judge was of the same opinion as the Subordinate Judge, but for the above dictum of the Chief Justice would have allowed the execution to proceed.

The appeal was heard by MELVILL and WEST, J.J.

*Dhirajlál Mathurádás*, Government Pleader, for the appellant:—The decree of the High Court, which is sought to be executed, was passed on the 10th September 1868. The certificate required by Act VIII. of 1859, Sec. 286, was given on the 27th October following. Application for execution of the decree was made to the Subordinate Judge's Court at Ahmedabad, to whom the decree had been transferred for execution first on the 20th August 1869, that is within a year of the date of the decree. Various applications were subsequently made, the last being the present one

(*a*) 7 Bom. H. C. Rep. O. C. J. 162.
(*b*) 1 Beng. L. R. (F. B.) 91.

dated the 17th March 1873. The Subordinate Judge issued a notice required by Sec. 216, and proceeded to execute the decree as if it were a decree of his own Court. This procedure is quite correct and is not at variance with the dictum of the Chief Justice in *Ládkuvarbái* v. *Ghoel Shri Sarsangji* (*supra*), where the decree had been transmitted for execution after a year. He also quoted *Govind Hari* v. *Shidrám* (c).

*Nagindás Tulsidás* appeared for the respondent.

PER CURIAM :—The observation of the Chief Justice in *Ládkuvarbái* v. *Ghoel Shri Sarsangji* has reference to a case in which more than a year had elapsed between the date of the decree and its transmission to another Court for execution. In the present case, there had been no such interval ; and we can see no reason for holding that the Court, to which the decree was sent for execution, had not the power to take the same steps, including the issue of a notice under Sec. 216, which it could take in execution of its own decree. We reverse the order of the District Judge and order that execution do proceed. Costs on respondent Jámnadás.

*Order accordingly.*

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[APPELLATE CIVIL JURISDICTION.]

*Appeal No.* 1 *of* 1874 *under Act XX. of* 1864.

March 27.

*In re* MOTIRA'M RU'PACHAND.

*Minor—Procedure—Act XX. of* 1864, *Secs.* 2 *and* 8—*Defendant—Certificate of Administration.*

Section 2 of Act XX. of 1864, does not prohibit a person having a claim against a minor from bringing a suit until a certificate of administration has been granted. He may properly bring his suit but immediately after his doing so he should apply to the District Judge for the appointment of an administrator, and it is competent to the District Judge under Sec. 8 of the Act to make that appointment.

THIS was an appeal from the decision of G. A. Hobart, Judge of the District of Khandesh.

(c) 7 Bom. H. C. Rep. A. C. J. 37.

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MOTIRA'M RU'PACHAND.

Motirám Ru'pachand applied to the District Judge requesting him to appoint an administrator to the estates of certain minors whose father owed him a debt exceeding Rs. 250 in value.

The District Judge rejected his application on the ground that the applicant was neither a relative nor a friend of the minors.

The appeal was heard by WESTROPP, C.J., and MELVILL, J.

*Sha'nta'ra'm Nárayan* for the appellant.

PER CURIAM :—Sec. 2 of Act XX. of 1864, except when the property of the minor is of small value not exceeding Rs. 250, prohibits any person from instituting or defending on behalf of the minor, any suit connected with the estate of the minor of which he claims charge, until he shall have obtained a certificate of administration under the Act. That does not amount to a prohibition to any person having a claim against the minor from bringing a suit in respect of such claim until a certificate of administration is granted, but he should immediately upon bringing it apply to the District Judge that an administrator should be appointed under Act XX. of 1864, if there be none. It is right and necessary that there should be some person to watch over the interest of the minor in such suit. Sec. 1 of the Act vests the care of the person and charge of the property of the minor in the Civil Court, *i.e.*, (Sec. 34) in the present case the District Judge. No relative having, as yet, been appointed as administrator of the estate of the minors, it is competent for the District Judge, under Sec. 8 of the Act, to appoint a suitable person to be administrator, and inasmuch as there has been a suit brought against the minors in respect of a part of their property, it is necessary for their interest that a proper provision should be made for the charge of that property and for their defence. The order of the District Judge is, therefore, reversed and he is directed to appoint such an administrator. This course is in accordance with that prescribed in *Dhondibá* v. *Kusá* (*a*) and in

(*a*) 6 Bom. H. C. Rep. A. C. J. 219.

Appeals, under the Minor's Act XX. of 1864, No. 6 of 1870, decided 6th February 1871, and Nos. 10, 11, 14 and 15 of 1871, decided 12th February 1872. *See* also *Vijkor* v. *Jijibhái* (*b*).

*Order accordingly.*

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[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No.* 233 *of* 1873.

March 30.

HARI YEMA'JI and others...*Defendants and Appellants.*

PARSHRA'M GUNDO .....*Plaintiff and Respondent.*

*Rent—Notice of enhancement.*

An *Inamdar* is not entitled to recover an increased rent if he has given notice of such increase in December 1870 for the current year 1870-71.

THIS was a special appeal from the decision of R.F. Mactier, District Judge of Satara, amending the decree of the Subordinate Judge of Karar.

Parshrám Gundo sued to recover the rent of certain *Inám* land belonging to him, for two years, viz., Rs. 20 for Shake 1791, and Rs. 50 for 1792, the latter being enhanced rent, and alleged that he had given notice of enhancement to the defendants. Hari and others denied the plaintiff's right to the enhanced rent. The first Court gave the plaintiff a decree for rent at the usual rate, rejecting his claim to the enhanced rent demanded. In appeal, this decree was amended by the District Judge who granted the enhanced rent claimed by the plaintiff for Shake year 1792 (A.D. 1870-71). In special appeal the case was remanded by the High Court for the determination by the lower appellate Court of certain issues one of which was :—Was notice of enhancement given in this case, before the beginning of the season of cultivation for which an enhanced rent was demanded ?

On this issue the District Judge returned the following findings—

(*b*) 9 Ibid 310.

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"The season for which an enhanced rent was claimed for this land is that, commencing 5th June 1870, as shown by the notice, dated December 1870, which claims enhanced rent for the season 1870-71. Cultivation would commence after the "*mrigsál*" of 1871 or June 5th, and this notice was, therefore, *about six months previous* to the season for which enhanced rent was claimed."

The appeal was argued before WEST and PINHEY, J.J., on 30th March 1874.

*Shántárám Náráyan* for the appellant.

WEST, J. :—The finding of the District Judge on the fifth issue is fatal to the claim set up by the plaintiff and exempts us from the necessity of discussing the other issues sent down to the District Court. He could not, by a notice given in December 1870, entitle himself to enhanced rent for the then current year 1870-71. The decree of the District Court must, therefore, be amended, and the plaintiff be awarded Rs. 40 as the rent of two years at the previously established rates minus Rs. 9-2-6 found by the Lower Courts to have been paid as *názúr chauthái* by the defendants on account of the plaintiff. The defendants admitted the claim to this extent and appear to have been always willing to pay what was due. The plaintiff must, therefore, pay their costs throughout.

[APPELLATE CIVIL JURISDICTION.]

April 8.

*Special Appeal No.* 406 *of* 1872.

BA'LA'JI GANESH.....*Defendant and Appellant.*

KHUSHA'LJI, SON AND HEIR OF BAHIROJI.....*Plaintiff and Respondent.*

*Lis Pendens.—Mortgage—Possession—Priority—Possession under a subsequent mortgage created during the pendency of a suit by a prior mortgagee.*

A sale or mortgage *pendente lite* is invalid as against the plaintiff and the vendor or mortgagor is under a disability to give any valid possession as against the plaintiff in the pending suit, to the party who be-

comes a purchaser or mortgagee during the pendency of the suit whether or not the purchaser or mortgagee *pendente lite* has knowledge of the prior sale or mortgage as to which the litigation is pending or of the litigation itself.

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*Kasim Shaw* v. *Unodapersad Chatterjee* (*a*) and *Manual Fruval* v. *Sanapalli Latchmidevamma* (*b*) followed.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Satara, reversing the decree of the Subordinate Judge of Tasgaum.

The appeal was argued before Westropp, C.J., and Melvill, J.

*Dhirajlál Mathuráldás* (Government Pleader) for the appellant.

*Shántárám Náráyan, contra.*

The facts of the case and the arguments used on both sides fully appear from the following judgment delivered by—

WESTROPP, C.J. :—This suit was brought by the plaintiff, Khushálji, to recover from the defendant, Báláji, possession of a house situated at Tasgaum in the Collectorate of Satara

The original owner, Rávji Kassái bin Rághu, upon the 12th of November 1858, mortgaged the house to the plaintiff who commenced, against his mortgagor Rávji, upon the 25th of February 1860, a suit upon that mortgage for possession, and obtained in the Munsiff's Court, on the 25th of April 1860, a decree awarding to him such possession. That decree was reversed in appeal, and the cause was remanded for trial. Upon the 15th November 1861, the plaintiff obtained against Rávji a fresh decree from the Munsiff for possession. In the period intervening between the plaintiff's first decree (25th April 1860) and his last decree (15th November 1861), Rávji mortgaged the same house to the present defendant Báláji upon the 11th May 1861, and let Báláji into possession. Neither the mortgage to the plaintiff nor that to the defendant Báláji was registered. The plaintiff having, on the 17th September 1868, instituted the pre-

(*a*) 1 Hyde 160 (*b*) Mad. H. C. Rep. 101.

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sent suit against Báláji for possession, the Subordinate Judge of Tasgaum dismissed the suit on the ground that Báláji's mortgage having been accompanied by possession was preferable to that of the plaintiff, notwithstanding its being prior in date. The District Judge reversed the decree of the Subordinate Judge and decreed that, if Báláji did not pay the amount of the plaintiff's decree against Rávji with costs, the house should be sold, and the proceeds of the sale applied in payment of the plaintiff's claim. Báláji has filed the present special appeal against that decree. Upon a special issue, the District Judge has found that, at the time of the execution by Rávji of the mortgage of the 11th May 1861, neither Báláji nor his father Ganesh Tátiá had any knowledge of the plaintiff's mortgage of the 12th November 1858, nor of the suit brought by the plaintiff against Rávji on that mortgage.

The question then is, whether the mere fact that the mortgage of 1861 was executed and possession under it given by Rávji to Báláji during the pendency of the plaintiff's suit against Rávji, to which suit Báláji was never made a party, invalidates that mortgage, albeit with possession, as against the plaintiff who has never had possession.

For the plaintiff, it was contended that, as well under Sec. 223 of the Civil Procedure Code as under the ordinary rule of equity, independently of that code, the defendant Báláji having accepted the mortgage of 1861 *pendente lite*, did so subject to the plaintiff's claim.

For the defendant, it was argued that, until the passing of Bombay Act III. of 1863, Satara was not subject to the Civil Procedure Code; and that the defendant being a mortgagee for valuable consideration without notice of the plaintiff's mortgage or of his suit, and with possession, had a superior equity to the plaintiff, both by English and Hindu law.

To the English Statute 2 Vic. C. 11 (which provides that a *lis pendens*, unless duly registered, shall not affect a purchaser without express notice) there is not any analogous enactment in this country.

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In England, before that Statute, if there had been a close and uninterrupted prosecution of the suit, a purchaser *pendente lite*, although for a valuable consideration and without notice, was bound by the decree (*c*). A mortgagee is *pro tanto* a purchaser.

In the well known case, *Bellamy* v. *Sabine* (*d*), cited by Mr. Shántárám Náráyan for the plaintiff and heard in 1857 by Lord Cranworth, C., and Lords Justices Knight Bruce and Turner, the effect of *lis pendens* was much discussed. Lord Cranworth said: "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him, not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right of a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence." After referring to *Culpepper* v. *Aston* (*e*), *Sorrell* v. *Carpenter* (*f*), and *Garth* v. *Ward* (*g*), he says: "The language of the Court in these cases as well as in *Worsley* v. *The Earl of Scarborough* (*h*) certainly is that *lis pendens* is implied notice to all the world. I confess I think that is not a perfectly correct mode of stating the doctrine.

(*c*) The cases are collected in 2 White and Tudor L. C. 47, 48; 1st ed.

(*d*) 1 De Gex & Jo. 566, 578, 584, S. C. 26 L. J. Ch. 797 N. S.

(*e*) 2 Ch. Ca. 115, 221.

(*f*) 2 P. Wms. 482.

(*g*) 2 Atk. 174

(*h*) 3 Atk. 392.

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What ought to be said is that, *pendente lite*, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The doctrine is not peculiar to Courts of Equity. In the old real actions the judgment bound the lands, notwithstanding any alienation by the defendant *pendente lite* (*i*), and certainly that did not depend on any principle arising from implied notice." Lord Justice Turner said: "The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation,—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding."

The maxim is *Pendente lite nihil innovetur* (*j*). Sir Thomas Plumer, M.R., in *Metcalfe* v. *Pulvertoft* (*k*) says that "the true interpretation of this rule is, that the conveyance does not vary the rights of the parties in the suit; that it gives no better right, having no effect with reference to any beneficial result against the plaintiff in that suit; and it is very reasonable that the litigating parties should be exempted from the necessity of taking notice of a title acquired under such circumstances. With regard to them it is as if it had never existed: otherwise suits would be interminable, if one party pending the suit could by conveying to others create a necessity for introducing new parties. The voluntary act, therefore, of the defendant cannot vary the situation or affect the right of the plaintiff."

(*i*) See Co. Lit. 344, b.; 2 Inst. 376.

(*j*) Co. Lit. 344, b; 2 Inst. 376; 1 Story Eq: Jur. § 405, § 406; *Trye* v. *The Earl of Aldborough*, 1 Ir. Chan. Rep. 666; *Gaskell* v. *Durden*, 2 Ball and B 167; *Going* v. *Farrell*, Beatty 472.

(*k*) 2 Ves. & B. 200, 205

The doctrine of *lis pendens* and the limits of it are very fully discussed in the cases of *Metcalfe* v. *Pulvertoft*; *Bellamy* v. *Sabine* (*l*); *The Bishop of Winchester* v. *Paine* (*m*); Sugden's Vend. and Pur. 1044 *et. seq.* 11th ed. (*n*); and 2 Spence Eq. Jur. 705, 706.

The reasoning contained in the passages already quoted from the judgments in *Bellamy* v. *Sabine*, shows that it matters nought whether he who becomes a purchaser or mortgagee *pendente lite* has knowledge of the prior sale or purchase as to which the litigation is pending or of the litigation itself, and also shows that the vendor or mortgagor is under a disability to give any valid possession as against the plaintiff to the party who becomes a purchaser or mortgagee during the pendency of the suit.

In *Kasim Shaw* v. *Unnodapersaud Chatterjee* (*o*), Mr. Justice Wells, quite irrespectively of Sec. 223 of the Civil Procedure Code, applied the doctrine of *lis pendens* to natives of this country. He spoke of it as "an equitable principle of universal application," and undoubtedly applicable to natives, and see per Holloway, J., to the same effect in *Mrs. Maria Varden Seth Sam* v. *Appundi Ibrahim Saib* (*p*). The general doctrine is very fully discussed by him in that case. It has been adopted also in Calcutta by Norman and Seton Karr, JJ., in *Umamoyi Burmoneea* v. *Tarini Prasad Ghose* (*q*), and by Peacock, C.J., and Bayley and Kemp, JJ., in *Hunooman Doss* v. *Koomeroon-nissa* (*r*) without any reference to Sec. 223 of the Civil Procedure Code. The case of *Manual Fruval* v. *Sanagapalli Latchmidévamma* (*s*) decided in 1872 at Madras by Kernan and Kindersley

(*l*) 1 De Gex and Jo. 566. (*m*) 11 Ves. 194.

(*n*) And see Ibid pp. 673, 1013; and 2 Ball and Beatty 186 and 32 Beavan 615.

(*o*) 1 Hyde 160. (*p*) 6 Mad. H. C. Rep. 80.

(*q*) 7 Calc. W. R. 225 Civ. Rul.

(*r*) Calc. W. R. Spec. No. from 1862 to 1864 F. B. 40.

(*s*) 7 Mad. H. C. Rep. 101

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JJ., is directly in point here. The principle laid down in *Bellamy* v. *Sabine* was applied, and it was held that it was immaterial whether or not the purchaser *pendente lite* had notice, and that he could not question the decree.

In *Krishnáppá Mahádáppá* v. *Bahiru Yádavráv* (*t*), some doubt was expressed as to the extent to which the rule of *lis pendens*, as stated in 1 Story Eq. Jur. 405, ought to be applied in India. In plac. 406, Story seems to base that rule upon the doctrine of notice. Neither *Bellamy* v. *Sabine*, nor the case in Hyde's Reports, appears to have been mentioned to the Court. It was, however, held there that a puisne mortgagee, who obtained possession of the lands under a decree in a suit against the mortgagor during the pendency of an earlier suit brought against the mortgagor by the prior mortgagee, could not maintain that possession against the decree in the last mentioned suit. The actual decision in that case, therefore, does not in any respect conflict with the doctrine laid down in *Bellamy* v. *Sabine* and the cases in 1 Hyde's Reports and in 7 Mad. H. C. Reports. The present case is a stronger one against the later mortgagee, for not only was his possession obtained, but his mortgage also was granted *pendente lite*.

We have not overlooked *Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* (*u*), which was the case of a purchase under an attachment upon a decree, which purchase was made pending a foreclosure suit upon a mortgage and the purchase was upheld. But there the attachment, under which the sale took place, was anterior even to the execution of the mortgage upon which the foreclosure suit was founded. The title, therefore, of the purchaser was paramount to any title that could be acquired under the decree in the foreclosure suit. That case, then, has not any bearing upon the present case.

Inasmuch as we think that the ordinary rule of *lis pendens* as acted upon in the cases in 1 Hyde and in 7 Madras H. C

(*t*) 8 Bom. H. C. Rep. A. C. J. 55.

(*u*) 14 Moo. Ind. App. 101, S. C. 8 Beng. L. R. 122.

Rep. must be applied here, it is not necessary that we should give any opinion as to whether Sec. 223 of the Civil Procedure Code could, having regard to the chronology of the events in this case, be applied to it, or as to the construction of that section, or the effect of Sec. 230 upon it.

The mortgage of 1861 to the defendant Báláji having been executed, and the possession under it given, during the pendency of the plaintiff's suit on the mortgage of 1858, the mortgage of 1861 must be deemed to have been taken subject to the claim of the plaintiff, as ultimately established by him, on the 15th November 1861, by the decree of that date.

The District Judge has virtually held that to be so, but he has decreed a sale of the house in satisfaction of the plaintiff's claim, and has not made any provision as to the disposal of the surplus proceeds, if any, after the discharge of that claim, viz., as to whether they should be made over to the mortgagor or to the puisne mortgagee Báláji. The plaintiff did not by his plaint ask either for a decree of foreclosure or of sale, and the mortgagor not being a party to this suit, and no decree for foreclosure or sale having been made against him in the suit brought by the plaintiff against the mortgagor, but only a decree for possession under the mortgage of 1858, the District Judge had not power to make any such decree for sale in this suit as he did, but merely a decree for possession, thus giving effect to and not going beyond the decree obtained against the mortgagor. We must, therefore, vary the decree of the District Judge by cancelling so much of the same as directs a sale, and by ordering that possession of the house in the plaint mentioned be forthwith delivered over by the defendant Báláji to the plaintiff, and by directing that the defendant Báláji do pay the costs of the suit and of both appeals.

MELVILL, J. :—I entirely concur in this judgment, and will only add, with reference to the observations made by me in *Krishnáppá Mahadáppá* v. *Bahiru Yádavráv* (*supra*), that I am inclined to think that I gave undue effect to the omission

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in Sec. 230 of Act VIII. of 1859 of certain words contained in Sec. 223. I mean the words "or some person claiming under a title created by the defendant subsequently to the institution of the suit." It would appear that no person can become a plaintiff under Sec. 230, unless he is in a position to dispute the right of the decree-holder *to dispossess him under the decree;* and it is clear from Sec. 223 that a purchaser *pendente lite* cannot dispute that right.

March 13.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No.* 399 *of* 1873.

SADA'SHIV A'NANT ... ... ... ... *Appellant.*
VITHAL A'NANT ... ... ... ... *Respondent.*

*Mortgage of a village without specification of boundaries—Accretion—Redemption.*

Where a village, without specification of boundaries, is mortgaged as a whole, the mortgagee is, on the one hand, entitled to it as a security with any casual increase or decrease which may occur to it; and is, on the other hand, subject to its redemption by the mortgagor to the same extent.

THIS was a special appeal from the decision of H. F. Parsons, Assistant Judge at Ratnagiri.

This was a suit for redemption of a certain share in the village of Mugij. When the mortgage of the share was effected, the village was described as a whole, and no boundaries were specified. Since the mortgage, additions had been made to the village by the Survey Officers; and the only question in the cause for determination was whether the mortgagor was entitled on redemption to obtain possession of the village with or without these additions.

Both the Courts answered this question affirmatively, and gave the plaintiff a decree accordingly.

The special appeal was heard by WEST and PINHEY, JJ.

*V. N. Mandlik* for the special appellant.

*Dhirajlál Mathuradás*, Government Pleader, for the special respondent.

The judgment of the Court was delivered by

WEST, J. :—The village of Mugij having apparently increased in size, through the decision of a Survey Officer, since the mortgage was made, the question is whether what was intended to be embraced in the contract was primarily the village as such, subject to the accidents to which it was liable as a whole, or a certain area of land described as the village of Mugij, but not viewed by the parties as susceptible of increase or diminution along with the extent of the village. If the boundaries had been precisely laid down by topographical references in the mortgage, we should have been of opinion that the second was the proper construction of the contract, but as they are not thus defined, and the village is simply dealt with as a whole, we think that the first construction is the true one. Since the mortgage was made, the Survey Officers have authoritatively settled the true boundaries of the village. It retains its identity, we think, notwithstanding any casual increase or decrease thus occasioned, and is as an aggregate both a security to the mortgagee and subject to redemption by the mortgagor. Had the area been diminished instead of enlarged, the plaintiff could not claim the return of what had thus been severed from the estate in the mortgagee's hands; as it has been enlarged, the mortgagee can hold it as thus enlarged only as a security, and from the moment that he is paid off only as a mere trustee for the mortgagor. This view of the relation of the parties coincides in principle with what was laid down in *Bakshirám* v. *Dárku* (a), and is supported by the authorities there cited and by 2 Spence's Equitable Jurisdiction of the Court of Chancery, 6 14.

The mortgagees were, we think, fairly entitled to their costs in the Court of the first instance. But they did not admit the right of the plaintiff to the full extent to which we have now recognised it, and have brought a special appeal mainly on the ground that it was thus recognised by the Assistant Judge. We shall, therefore, so far modify the judgment of the District

(a) 10 Bom. H. C. Rep. 369.

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Court as to order that the mortgagees represented by the special appellant receive their costs of the original suit, and in other respects affirm the Assistant Judge's decree. Costs of this appeal to be borne by special appellant. The substantial identity of the parties, with those who have conducted the litigation below, is not questioned in this Court.

*Decree amended.*

March 18.

[APPELLATE CRIMINAL JURISDICATION.]

*In re* BA'LA'JI SITA'RA'M.

*Sanction for prosecution—Alternative charge—The Code of Criminal Procedure, Sec. 470—Requisites of a proper sanction.*

When it is intended to charge a person with having made a false statement in the Court of a Magistrate or (alternatively) a false statement in the Court of a Subordinate Judge, there must be a proper sanction for a prosecution on each branch of the alternative.

A sanction for a prosecution under Sec. 470 of the Criminal Procedure Code must designate the Court where the false statement was alleged to have been made and the occasion on which it was committed.

It is desirable, if not necessary, that in the sanction for prosecution the description of the offence intended to be prosecuted should be stated in general terms although details may be omitted.

THIS was an application for the exercise of the Court's extraordinary jurisdiction.

The applicant, Báláji Sitárám, was a partner with Anáji Parshrám in a farm for the collection of tolls in certain villages in the Satara District. Disputes arising between them led to suits in the civil, and prosecutions in the criminal, courts, in which evidence given by one party was characterized by the other as false. Anáji Parshrám suffered five years' rigorous imprisonment for having made a false statement on one of these occasions; and he now, in his turn, seeks to prosecute his opponent, the present applicant Báláji Sitárám. With this view he attempted, without success, to obtain the necessary sanction from several Magistrates and courts before whom Báláji Sitárám was examind, and at

last succeeded in obtaining it from the District Magistrate of Satara in the following terms :— 1874.

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"I hereby sanction a prosecution against Báláji Sitárám being instituted for having made varying statements on solemn affirmation before different courts at different times under Sec. 193 of the Indian Penal Code."

Proceedings having been instituted against Báláji Sitárám upon the above order, he applied to the High Court to annul it.

The application was heard by WEST and NA'NA'BHAI HARIDA'S, JJ.

*Branson* (with him *Pándurang Bálibhadra*) for the petitioner.

*Shántárám Náráyan* for *Dhirajlál Mathurádás*, Government Pleader, in support of the sanction.

WEST, J., in delivering judgment, said:—The first point we have to consider is that which arises on the argument that the application to the District Magistrate to grant his sanction for the prosecution is in the nature of an appeal against the refusal of a Magistrate subordinate to him. It is not worded as an appeal; but still it may have the practical effect of one. Yet, supposing that the application has such an effect, we think that its reception was not a step going beyond what the law itself contemplates.

The next point relates to the extent of jurisdiction to grant such a sanction. When it is intended to charge a person with having made a false statement in the court of a Magistrate, or (alternatively) a false statement in the court of a Subordinate Judge, it is not sufficient that the sanction to prosecute him should be given by one of such courts or its superior. It is necessary that the sanction should be given by both of them or their superiors. There must in fact be a proper sanction for a prosecution on each branch of the alternative.

Then with regard to the nature and terms of the sanction, no doubt the language of Sec. 470 of the Criminal Procedure

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BA'LA JI SITA'RA'M.

Code is very wide. The sanction, it prescribes, may be expressed in general terms, and need not name the accused person. These provisions are introduced to guard against failures of justice or embarrassments in its administration, which, under the corresponding provision of the old Code, sometimes occurred.

But we do not think that the new enactment is intended to provide for a sanction expressed with so little definiteness as equally to justify the prosecution of *any* person for *any* offence and in any court whatever. The sanction given must refer to the court in which the false statement is alleged to have been given, and it must also refer to the occasion on which it was given. Both must be properly designated in order that the trying Court may inform itself as to the investigation or trial upon which it is really authorized to enter. And generally also, we think that it is desirable, for the ends of justice, if not necessary, to state the offence intended to be charged in general terms, though details need not be given.

We, therefore, annul the sanction in the present case on the ground that neither the courts in which the false statements were alleged to have been made by the accused nor the occasions on which they were made are designated. At the same time, we do not say that it will not be quite competent to the District Magistrate, after reading these observations, to grant, as to offences apparently committed in courts subordinate to his own, a fresh sanction free from the defects and supplying the omissions above noticed. The expediency of granting the sanction rests in his own discretion.

*Sanction annulled.*

[APPELLATE CIVIL JURISDICTION.]

1874.
March 24.

*Special Appeal No.* 450 *of* 1873.

BA'LA'JI NA'RA'YAN KOLATKAR .....*Appellant.*
RA'MCHANDRA' GANESH KELKAR and
othres.....*Respondents.*

*Bombay Act I. of* 1865—*Paramount rights of Government with respect to land revenue—Mortgage lien—Registration—Possession.*

The paramount rights of Government in respect of debts due to the Crown are not transferred to alienees (such as *Inámdárs*) of Government revenue.

If an *Inámdár* fails to recover his rents by any of the special processes provided in the Regulations, and is obliged to go into the Civil Court and obtain a decree for arrears, the sale of the land in execution of such a decree has the same effect (and no more) as a sale of land in execution of a decree for any other debt.

A mortgage deed, when registered, is valid without possession.

THIS was a special appeal from the decision of E. Cordeaux, Assistant Judge at Poona, amending the decree of the Subordinate Judge of Pátas.

Báláji sued to recover the amount of a mortgage debt due by Balvantráv under a deed dated 5th August 1866. He sought to recover the amount personally from the defendants or, in default, from the sale of the mortgaged property. The defendant, Balvantráv, admitted the mortgage bond and stated that the plaintiff's claim might be realized by the sale of the mortgaged property. The other defendants answered that the mortgaged fields were sold in satisfaction of a decree which the *Inámdár* had obtained for payment of assessment of the land, and that as they had purchased the land at such a sale, they were not liable for the payment of the plaintiff's mortgage lien. The Subordinate Judge gave the plaintiff a decree for the amount claimed, first from the mortgagor (Balvantráv) personally or, in default, from the mortgaged fields. In appeal, however, the Asssistant Judge held that as the land was *Inám* land, and was sold for payment of assessment due to the *Inámdár* under a Civil Court's decree, the sale was not subject to the plaintiff's mortgage lien. He, accordingly,

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amended the Subordinate Judge's decree by ordering the plaintiff's claim to be satisfied by the mortgagor personally, and not from the land.

In special appeal, it was contended for the plaintiff that the defendants could not purchase the land without being liable for the plaintiff's mortgage lien, which, by law, attached to the land, and that the lower appellate court was wrong in holding that the *Inámdár's* lien on the land for arrears of rent had precedence over other pre-existing liens on the same land.

The special appeal was argued before MELVILL and NA'NA'BHAI HA'RIDA'S, JJ., on the 24th March 1874.

*Janárdhan Sakárám Gádgil*, for the appellant.

*V. N. Mandlik*, for the respondents.

MELVILL, J.:—This case does not appear to be affected by the decision in *Abdul Gani* v. *Krishnaji* (*a*). That decision proceeds upon the provisions of Bombay Act I. of 1865 (which, by Section 49 of the Act are not to be applied to alienated villages, unless specially extended to them,) and upon the paramount rights of Government in respect of debts—which are discussed in *Secretary of State for India* v. *Bombay Landing and Shipping Company* (*b*), and which rights cannot be held to be transferred to the alienees of Government Revenue. The Regulations contain certain special provisions for enabling superior holders to realize their dues from their tenants: but we cannot find in them any provision which can be construed as making those dues a paramount charge upon the land. We think that if an *Inámdár* fails to recover his rents by any of the special processes provided in the Regulations, and is obliged to go into the Civil Court and obtain a decree for arrears, the sale of the land in execution of such a decree has the same effect (and no more) as a sale of the land in execution of a decree for any other debt. Under this view, we must hold that the defendants purchased the land subject to the plaintiff's mortgage (which was registered, and therefore valid even without possession), and we accordingly reverse the decree of the Court below and restore that of the Subordinate Judge. Costs of both appeals on special respondents.

(*a*) 10 Bom. H. C. Rep. 416. (*b*) 5. Bom. H. C. Rep. O.C.J. 48—50.

[APPELLATE CIVIL JURISDICTION.]

1874.
March 4.

*Regular Appeal No.* 41 *of* 1873.

SHIDMAL GURU .. ..*Plaintiff and Appellant.*

W. ANDERSON, Revenue Survey and Settlement Officer, and the Máhálkari of Nargund ..*Defendants and Respondents.*

*Bombay Act III. of* 1863, *Sec.* 3—*Suit on account of Inam—Suit for possession of Inam—Jurisdiction.*

Bombay Act III. of 1863, Sec. 3, deprives the Civil Courts of jurisdiction in respect of all claims against Government on account of *Ináms*, in other words, claims referring to total or partial exemption from the payment of Government revenue, but it does not deprive the Civil Courts of jurisdiction in respect of claims to recover possession of *Inám* lands.

THIS was a regular appeal from the decision of Baron Larpent, Judge of the District of Dhárwár, rejecting the plaintiff's claim.

The plaintiff filed a suit to recover possession of a piece of *Inám* land, which he alleged had been wrongfully taken possession of, and sold by the defendants.

The defendants pleaded want of jurisdiction in the Court, and denied the plaintiff's title. The District Judge rejected the plaintiff's claim.

The appeal was heard by SIR CHARLES SARGENT and NA'NA'BHAI HARIDA'S, J.

*Bahiravnáth Mangesh* for the appellant.

*Dhirajlál Mathurádás*, Government Pleader, for the respondents.

SIR CHARLES SARGENT, in delivering the judgment of the Court, said—

Mr. Dhirajlál Mathurádás has objected on behalf of the respondents that, under Bombay Act III. of 1863, Section 3, the Civil Courts have no jurisdiction to entertain this suit, it being a suit relating to an *Inám*. Mr. Bahiravnáth, for the appellant, meets this objection by urging that the expression "claims against Government on account of Inams," as used in this enactment, refers to claims to hold lands totally or partially exempt from the payment of the Govern-

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ment revenue, and he maintains that the present suit is not such a suit, but is one simply for recovery of possession of the *Inám* lands themselves; and that, consequently, the Civil Courts have not lost their jurisdiction. In support of this view, Mr. Bahiravnáth cited Section 6, Regulation XXIX. of 1827, the language of which is precisely similar to that of the Act of 1863, and contends that, reading that Regulation by the light thrown upon it by the Inam Act XI. of 1852 and the Government Resolution No. 2449 of 1854, printed at page 58 of the Revenue Circular Book of 1860, it is clear that the Legislature by that section intended to exclude from the Civil Court's jurisdiction those claims only which related to exemptions from revenue demands. He further relied on the judgment of Sir M. Sausse in *Vishnu Trimbak* v. *Tátió* (*a*) as supporting this view.

We are of opinion that the object of both these enactments was precisely the same, viz., to introduce the Regulation into a new province, and as to any doubt on the construction of the words "all claims on account of Inams," we think it is cleared up by the language of the Inam Act XI. of 1852 and by the interpretation which the Government put upon it under the authority of a special provision in that Act as shown by the Government Resolution before referred to. The present suit is not one for exemption from Government demands, but simply to obtain possession of the lands in question, and even if the plaintiff succeeds in obtaining a decree in his favour, the Government may, notwithstanding, come forward and claim their assessment.

As to the non-receipt of evidence to prove the loss of the *Tákid*, we think that the Judge would have exercised a sounder discretion in admitting it.

If the evidence, tendered by the plaintiff to prove that the original *Tákid* had been lost, had been satisfactory, the copy of the *Tákid* from the *Pátil's Daftar* would have been admissible in evidence. We must, therefore, reverse the decree and remand the case for the Judge to receive the evidence in question and to pass a new judgment awarding costs.

(*a*) 1 Bom. H. C. Rep. A. C. J. 22.

[APPELLATE CIVIL JURISDICTION.]

1874.

April 13.

*Special Appeal No.* 465 *of* 1873.

ITCHA'RA'M DAYA'RA'M .....*Plaintiff and Appellant.*

RA'IJI JAGA' and another...*Defendants and Respondents.*

*Mortgage in Guzerat—Rights of a prior and puisne mortgagee—Possession—Purchaser of equity of redemption with notice of a subsequent incumbrance.*

The rule of Hindu law that a mortgage with possession takes precedence of a mortgage of a prior date, but unaccompanied by possession does not apply to Guzerat.

Where in Guzerat the defendant, a puisne mortgagee in possession, had notice of plaintiff's prior mortgage, the defendant was held not entitled to claim the benefit of the above rule of Hindu law.

Registration could not of itself alter this rule of Hindu law except so far as effect may be given to it by statute, and registration secures the same object which the Hindu law intended to secure by requiring possession, viz., notice to subsequent incumbrancers of the existence of a prior incumbrancer.

The purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation, as regards such subsequent incumbrances, as if he had been himself the mortgagor: he cannot set up against such subsequent incumbrances either a prior mortgage of his own, or a mortgage which he or the mortgagor may have got in.

THIS was a special appeal from the decision of J. W. Walker, Assistant Judge at Ahmedábád, reversing the decree of the Subordinate Judge of Umrath.

Itchárám Dayárám sued to recover possession of a field from Ráiji Jagá and another, and stated that he had purchased it on the 22nd September 1868 at a court's sale subject to a mortgage lien which was assigned to him by the mortgagee. The defence chiefly was, that the plaintiff never had possession of the property under his mortgage, while the defendants were mortgagees in possession. The Court of the first instance decreed the plaintiff's claim. In appeal, however, the Assistant Judge reversed that decree on the ground that the plaintiff, though a prior mortgagee, had not obtained possession

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under his mortgage, while the defendants were in possession, though their mortgage was of a subsequent date.

In special appeal it was contended that the defendants, though mortgagees with possession, having had notice of the plaintiff's prior mortgage, the lower Court was wrong in holding that the plaintiff's mortgage was not valid against them.

The appeal was argued before MELVILL and PINHEY, JJ.

*Shivshankar Govindrám* for the special appellant.

*Dhirajlál Mathurádás* for the special respondents.

MELVILL, J.:—The rule of Hindu law that a mortgage with possession takes precedence of a mortagage of prior date, but unaccompanied by possession, has not, I think, been held applicable to Guzerat: *Mathurádás* v. *Káliá*(*a*), *Hari Rámchandra* v. *Mahádáji* (*b*), and *Krishnáppá* v. *Bahiru* (*c*). But even if the rule were applicable in the present case, I should be inclined to hold that the defendants, having had notice of the plaintiff's prior mortgage, could not claim the benefit of it. I do not know any other ground, except that of notice, which will justify the decisions of this Court, which relax the rule of Hindu law in favour of registered mortgages. In *Hari Rámchandra* v. *Mahádáji* in which all the cases bearing on the subject are reviewed, the Court said: "We consider that we are only carrying out the views of the late Sadr and the present High Courts by holding in the present case that in the Konkan the registration of a mortgage without possession cures any defect or imperfection which arose from the non-completion of the transaction by delivery of possession." It is clear that registration could not of itself alter a rule of Hindu law, except so far as such effect may be given to it by statute; and I understand the Court to have meant that registration secures the same object which the Hindu law wished to secure by requiring possession, viz., notice to subsequent incumbrancers of the existence of a prior incumbrance. That appears to me to be the principle on which the rule of Hindu law is founded, and on which this Court has acted in its decisions regarding re-

(*a*) 7 Bom. H. C. Rep. A. C. J 24. (*b*) 8 *Ib.* 50. (*c*) *Ibid.* 55.

gistration. Then, if one kind of notice be sufficient to satisfy the rule of Hindu law, why should not another kind of notice? I conceive that the true principle is that laid down in *Gopál* v. *Krishnáppá* (*a*), and that the present case comes under the class of constructive frauds. The same principle is stated in Story's Eq. Jur., 9th Ed., Sec. 395, and illustrated by the case of a creditor who takes a mortgage of property with notice of a subsisting equitable mortgage.

But, although, in my opinion, the Assistant Judge's decision cannot be supported on the ground of the defendants' possession, it can, I think, be maintained on another ground. The plaintiff, subsequently to the mortgage to the defendants, purchased at a court sale the equity of redemption. Now generally speaking, a purchaser of an equity of redemption with notice of subsequent incumbrances, stands in the same situation, as regards such subsequent incumbrances, as if he had been himself the mortgagor: he can neither set up against such subsequent incumbrances a prior mortgage of his own, nor, consequently, a mortgage which he or the mortgagor may have got in: *Toulmin* v. *Steere* (*b*), *Greswold* v. *Marsham* (*c*), and *Moratta* v. *Murgatroyd* (*d*). The plaintiff, therefore, cannot set up his own mortgage, unless he can show that he is a purchaser for valuable consideration without notice of defendants' mortgage; and this he cannot be allowed to show, inasmuch as he is a purchaser at a court sale: *Chintáman Bháskar* v. *Shivrám Hari* (*e*).

On this ground alone, I would confirm the decree of the lower Court.

PINHEY, J. :—I am of the same opinion as to the ground on which my brother Melvill proposes to confirm the decree of the Court below.

But I refrain from expressing any opinion on the first point considered by my brother Judge, as it is not necessary that I should do so, in order to arrive at a decision of the case.

(*a*) 7 Bom. H. C. Rep. A. C. J. 60. (*b*) 3 Mer. 210. (*c*) 2 Ch. Ca. 170.
(*d*) 1 P. Wms. 933. (*e*) 9 Bom. H. C. Rep 304.

1874.
March 12.

[ APPELLATE CRIMINAL JURISDICTION.]

## REG. *v.* DAYA' A'NAND AND RANCHOD KHA'LPO.

*Confession—Signature of accused—The Code of Criminal Procedure, Sections* 167, 256, 346—*Duty of Judge to prevent production of inadmissible evidence.*

The direction of Section 346 of the Code of Criminal Procedure, enjoining that an accused person shall sign the record of his confession, is not satisfied by the following:—"Signature of *A.B.* (the accused); the handwriting of *C.D.*" Where the conviction of a person was based upon a confession thus subscribed, the High Court reversed it, and held that the Session Judge was bound to prevent the production of such a confession.

THE two accused persons were convicted of murder by G. M. Macpherson, Acting Session Judge of Surat, and sentenced to death.

The conviction was principally based upon a confession made by the second prisoner, Ranchod Khálpo, and recorded by the Second Class Subordinate Magistrate of Bulsad under Sec. 122 of the Code of Criminal Procedure. The confession was in the form of questions and answers, and duly attested by the signature of the Magistrate; but instead of the signature or mark of the accused person it bore the following subscription :—

"The signature of Ranchod Khálpo; the handwriting of Venktesh Narotam, Taláti of Binári."

The appeal was heard by WEST and NA'NA'BHAI HARIDA'S, JJ.

*Chunilál Mániklál* for the appellants:—The confession of Ranchod, on which the conviction mainly rests, is defective. Section 346 of the Code imperatively demands that the accused person shall sign or attest by his mark the record of his confession. Both these elements are wanting. There is no mark, and there is nothing to show that the accused authorized the writer of his name to sign for him.

*Dhirajlál Mathurádás*, Government Pleader, for the Crown.

PER CURIAM :—We must reverse the conviction and sentence in this case. The Second Class Subordinate Magistrate, Mr. Mániklál Venilál, in taking the confession of the accused Ranchod, omitted to cause that prisoner to sign

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or mark the confession. This, which was a very serious piece of carelessness, makes the confession inadmissible as evidence, and even under Sec. 91 of the Evidence Act excludes secondary evidence of what the prisoner said as ruled in the case of *Reg* v. *Bái Ratan* (*a*). Section 167 of the Evidence Act implies that the improper reception of evidence is not generally to be made a ground for the reversal of a judgment, unless it was objected to by the party who was prejudiced by its admission; but again, Section 256 of the Code of Criminal Procedure says: "It is the duty of the Judge in his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties." If this discretion should be strictly exercised in any case, it should be exercised in the case of a confession afterwards repudiated, and the effect of which is to bring about a capital conviction not only of the prisoner who made it but of his co-accused. We think, therefore, that the Session Judge was bound to prevent the production of Ranchod's confession in this case. The testimony recorded apart from that confession is admittedly insufficient to sustain the charge, and we are thus compelled to reverse the judgment passed against the prisoners.

*Conviction and sentence reversed.*

(*a*) 10 Bom. H. C. Rep. 166.

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[APPELLATE CIVIL JURISDICTION.]

*Civil Referred Case No.* 12 *of* 1873.

VA'NA' JAGANNA'THJI .....*Appellant.*

HATA' DIPA'JI .....*Respondent.*

*Attachment of property of third person—Liability of execution-creditor in damages.*

There is not any universal rule that a judgment-creditor is or that he is not liable in suit for a wrongful seizure, or for injury to the goods while under seizure. His liability must depend upon the circumstances of the case, *i.e.*, upon the fact whether the wrongful seizure or the injury is the result of his own conduct, for instance, if the judgment-creditor personally, or his authorized agent (*ex. gr.*, his pleader). apply, under Section 214 of the Civil Procedure Code, for the attachment of property which is specially designated in that application, and if the Court grant its warrant for the seizure of that particular property, and the officer of the Court execute the warrant, and the property be not that of the judgment-debtor, the judgment-creditor would certainly be liable for that wrongful seizure, and the officer of the Court could justify under the warrant, and would not be liable so long as he kept within the duty expressly prescribed for him by it.

But if the application of the judgment-creditor were for a general attachment under Section 218 of the Code, and the Court took no such security from him as it might take under that section, and if the Court granted a general warrant for the attachment of the moveable property of the judgment-debtor, and the officer of the Court, without any suggestion to that effect from the judgment-creditor or his agent, beyond a general direction to execute the warrant, were to seize property not belonging to the judgment-debtor, the judgment-creditor would not be responsible.

*Quære.*—Whether under such circumstances as these last mentioned, the officer of the Court would be responsible?

THIS case was referred for the opinion of the High Court by W. M. P. Coghlan, Judge of the District Court of Tanna. The District Judge raised two issues, viz: (1) whether the rice attached was the property of the plaintiff, and (2) whether plaintiff can recover damages, and found, the first issue in favour of, and the second against, the plaintiff, pending the decision of the High Court. He made the following observations in his finding on the second issue:—

"I feel considerable difficulty on the second issue in consequence of the apparently contradictory rulings on the question whether, irregularity and malice apart, a judgment-creditor, carrying out his decree, is liable in damages for the attachment of property which belongs to third parties.

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"I believe that I may say that prior to the ruling of the High Court in *Dámodhar Tuljárám* v. *Lallu Khusáldás* (*a*) the practice in this Presidency was that the judgment-creditor was not liable. The contrary doctrine, however, prevailed in the Bengal High Court, *Mussamát Subjan Bibi* v. *Sheikh Sariatulla* (*b*).

"In *Dámodhar Tuljárám* v. *Lallu* the District Judge (myself) had disallowed a claim for damages against a judgment-creditor on the ground that 'the plaintiff may have suffered loss, but legally there had been no injury, the defendant's conduct having been that of a reasonable man carrying out a decree of a court in a usual manner.'

"On special appeal the decree was reversed by the High Court (Melvill and Kemball, JJ.) on the ground that a 'judgment-creditor who attaches property which does not belong to his judgment-debtor, commits a trespass, for which he is responsible in damages, even though he may have acted without malice and mistakenly.' This would appear to be conclusive, but the following will show that it cannot be so taken :—

"On the 27th August 1872, the Joint Judge of Tanna (S. Tagore) heard a suit against a judgment-creditor to recover damages for the attachment of some grain in which the plaintiff had a half share. The learned Joint Judge took a distinction between the case and *Mussamát Subjan Bibi* v. *Sheikh Sariatulla* in that there could be no trespass, because the judgment-debtor admittedly held a half share in the property attached, and unaware apparently of *Dámodhar* v. *Lallu*, for the pleaders engaged tell me that the case was not mentioned, stated a case for the High Court, *Khana* v. *Degumya*, Appeal No. 335 of 1871, for the determination of the very important question as to the liability of a decree-holder for the wrongful attachment of the goods of a stranger in execution of a decree, and the Honourable the High Court decided the point in the following words :—

(*a*) 8 Bom. H. C. Rep. A. C. J. 177.
(*b*) 3 Ben. H. C. Rep. A. C. J. 413.

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'The Court are of opinion that, as it does not appear that the damage was caused by any interference by the judgment-creditor with the property after it was seized by the *Nazir*, an action will not lie against him for the damage sustained by the grain.'

"Nothing is said of the bearing of the fact of the property of the judgment-debtor in half the grain attached, on the question of trespass, perhaps because it has no bearing on the question, albeit that it might in such a case be a good plea to show that the wrongful taking was the result of inevitable accident in asserting a legal right. *Khana* v. *Degumya* appears, however, to have been decided on the broad principle that a judgment-creditor, who has not interfered with property after attachment, is not liable to an action for damages.

"The rulings in *Dámodhar* v. *Lallu* and *Khana* v. *Degumya* appear to be at variance. It is interesting to observe that after the ruling in *Dámodhar* v. *Lallu* by the Honourable Judges Melvill and Kemball, but before its publication, His Lordship the Chief Justice (Westropp, C.J.,) delivered the well known judgment in *Kálu* v. *Dámodhar* (*c*) in which His Lordship ruled that it is settled law that, save for irregularity, a purchaser at a court sale is not entitled to a refund of purchase-money, because the judgment-debtor had no right, title, or interest in the property sold. Having so ruled, HisLordship guardedly said that it was not to follow from his ruling that 'a person, whose property has been wrongfully seized and sold, or seized alone, has not a remedy against the execution-creditor.' His Lordship then reviewed several cases, both favourable and unfavourable to the liability of the execution-creditor, and declined, sitting alone, to overrule the decisions in which the liability of the execution-creditor was affirmed, not, however, without suggesting misgivings as to their correctness.

"In the face of the rulings I have referred to, I shall submit this statement of the case to the High Court, in order

(*c*) 9 Bom. H. C. Re. 92.

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to have the law settled as to whether, irregularity and malice apart, a judgment-creditor is liable in damages for the wrongful attachment of goods, not the property of his judgment-debtor.

"As the point will be decided by the High Court, my opinion is of no importance; it is necessary, however, to state it. It is that loss occurring in the *bonâ fide* execution of a decree is *damnum absque injuria*, and that a suit for damages does not lie.

"I add only one word on the question of expediency. The reason of the rule of law that a judgment-creditor shall not be liable for a *bonâ fide* mistake in carrying out his decrees appears to be clear. It is expedient that decrees of Courts of justice should be operative and easy of execution without risk or danger. Humanly constructed machinery cannot work without inconvenience of some kind. The object is to reduce such inconvenience to a minimum. The inconvenience of carrying out a decree is, I think, reduced to a minimum under this rule, the only inconvenience being that the public must be careful either to retain their goods in their own custody, or to entrust them only to solvent persons. On the other hand, if it be affirmed as settled law that a judgment creditor, who attached property which does not belong to his judgment-debtor, commits a trespass for which he is liable in damages, even though he may have acted *bonâ fide*, I foresee great inconvenience in the execution of legal process, and a fruitful cause of offences against the law. If it should become generally known that a judgment-creditor is liable in damages for mistaken attachment, it cannot be doubted that when the hated creditor appears with a decree, he will find himself well supplied with materials for future actions for damages.

"It may be said that a court would refuse to grant damages when goods, not the property of the judgment-debtor, were placed in the way of the judgment-creditor; but the answer is, that it would be practically impossible for the

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courts so to distinguish in most cases. Such a ruling of the law would not fail to result in increased litigation and in an augmentation of the heart-burning and ill-feeling which exists in a deplorable degree in this country between the two well defined classes of creditors and debtors.

"I find, then, on the second issue, that the plaintiff cannot recover damages, and submit this statement of the case to Her Majesty's High Court of Judicature, under Section 28 of Act XXIII. of 1861. The decree, contingent on the opinion of the High Court, will be to reverse the decree of the Subordinate Judge, and reject the claim with costs on the respondent."

The case was argued before WESTROPP, C.J., MELVILL and WEST, JJ., on the 2nd December 1873.

*Dhirajlál Máthurádás*, Government Pleader, for the appellant.

*Shántárám Náráyan* for the respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by

WESTROPP, C.J.:—The appellant obtained a decree against Jatkyá, towards satisfaction of which certain rice in husk was attached and sold. The respondent, alleging that the rice in husk is his property, has brought the present suit against the appellant to recover, by way of damages, the value of the rice. The judgment-debtor, Jatkyá, has, under Section 73 of the Civil Procedure Code, been most unnecessarily added as a party defendant to this suit. The Subordinate Judge of Penn has made a decree in favour of the respondent on the ground that the rice belonged to him, and was, therefore, wrongfully seized and sold in the suit brought by the appellant against Jatkyá. The appellant, Váná, has appealed to the District Judge of Thana, who, under Section 28 of Act XXIII. of 1861, has submitted to this Court the question "whether, irregularity and malice apart, a judgment-creditor is liable in damages for the wrongful attachment of goods not the property of his judg-

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ment-debtor." The District Judge has not informed us whether the application of the appellant, in the suit against Jatkyá, for an attachment, was accompanied by any such inventory of the property to be attached as is mentioned in Section 214, Civil Procedure Code, or otherwise specified the rice in question as part of the property to be attached, or whether the application was for a general attachment, and whether the attaching Court took the security contemplated by Section 218, or held any examination under Section 219, or what was the form of warrant granted, nor has he sent up the plaint, written statement, or exhibits. We are then compelled to gather, so far as we may, from the summary of the pleadings given in his judgment in this case by the District Judge, what are the circumstances under which the rice was seized and sold. The plaint is there represented as alleging that the rice was sold "at the instance of the defendant" (present appellant Váná) "as the property of his judgment-debtor, one Jatkyá, who occupied his (defendant's) house as a tenant." Váná, in his written statement, does not appear to have denied that the attachment and sale were made at his instance, but he asserted that the rice "was attached while in his judgment-debtor's possession" (which is a circumstance that could not make the attachment rightful, if the goods did not belong to the latter) (*d*) "that a sale once effected cannot be set aside, and that the rice belonged to his judgment-debtor and not to the plaintiff." The District Judge has found that the rice, at the time of the seizure and sale, was the property of the respondent (the present plaintiff), and not that of Jatkyá, the judgment-debtor of the appellant (defendant); and has expressed his opinion that Váná, the judgment-creditor, is not responsible in damages for the wrongful seizure and sale of the appellant's rice.

It appears to us that, upon the materials supplied to us by the District Judge, we must assume that the seizure and sale of the rice were both traceable to the direct action

(*d*) *Dawson* v. *Wood*, 3 Taunt. 256., *per* Heath, Lawrence, and Chmbre, JJ., *dissentiente* Mansfield, C.J.; *Edwards* v. *Bridges*, 2 Stark, 396; *Glasspoole* v. *Young*, 9 B. and C. 696.

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of the appellant himself. If that be so, he certainly is responsible in damages to the respondent, inasmuch as it is found as a fact by the District Judge that the rice was, when those events occurred, the property of the respondent and not of the judgment-debtor, and, therefore, the seizure and sale were wrongful, and being so, the tort-feasor is liable to suit for the tort which he has committed. It is quite immaterial whether or not he knew that the rice belonged to the respondent. The appellant ought, before he prompted the Court through its officer to seize the rice, to have ascertained that it belonged to the judgment-debtor. He chose, however, to run the risk of a wrongful seizure and, having done so, must now bear the consequences.

There is not any universal rule that the judgment-creditor is, or that he is not, liable in suit for a wrongful seizure, or for injury to the goods while under seizure. His liability must depend upon the circumstances of the case, *i.e.*, upon the fact whether the wrongful seizure or the injury is the result of his own conduct. For instance, if the judgment-creditor personally, or by his authorized agent (*e.g.*, his pleader), apply under Section 214 of the Civil Procedure Code for the attachment of property, which is specially designated in that application, and if the Court grant its warrant for the seizure of that particular property, and the officer of the Court execute that warrant, and the property be not that of the judgment-debtor, the judgment-creditor would certainly be liable for that wrongful seizure, and the officer of the Court, on the other hand, could justify under the warrant of the Court, and would not be liable so long as he kept within the duty expressly prescribed for him by that warrant. But if the application of the judgment-creditor were for a general attachment under Section 218 of the Code, and the Court took no such security from him as it might take under that section, and if the Court granted a general warrant for the attachment of the moveable property of the judgment-debtor, and the officer of the Court, without any suggestion to that effect from the judgment-creditor or his agent, beyond a general direction to execute the warrant, were to

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seize property not belonging to the judgment-debtor, the judgment-creditor would not be responsible, inasmuch as the warrant, which he sued out, and under which the officer of the Court purported to act, did not direct the officer to do what he did, and the latter (if the case were in England) would alone be liable for the tortuous act, which was exclusively his own (*e*). In the case of such a general warrant the officer ought to be cautious not to act upon it until the judgment-creditor or his agent points out the goods to be seized as those of the judgment-debtor. A Sheriff, if he have any doubt as to the ownership of the goods, generally demands an indemnity-bond from the creditor before acting upon the writ. If he make the seizure, and the goods turn out to be those of a third person not the debtor, both the Sheriff (in England) and the creditor who pointed out the goods as those of the debtor, are liable to an action of trespass. If, in such a case, the owner of the goods elect, as he generally does, to sue the Sheriff, and recover damages, the latter can recoup himself by suing the creditor on his indemnity-bond. But even if the Sheriff have neglected to take an indemnity bond, he is not without remedy, if the creditor had represented to him that the goods were those of the judgment-debtor, for an action on the case for deceit, *i.e.*, for the misrepresentation, lies for the Sheriff against the judgment-creditor, as was decided in *Humphrys* v. *Pratt* (*f*) by the House of Lords in 1831, Lords Tenterden and Wynford moving the judgment of the House to that effect, affirming the judgment of the Court of Exchequer Chamber in Ireland, which had affirmed a similar judgment of the Court of Exchequer. The Court of Exchequer Chamber was divided, Bushe, C. J., O'Grady, C. B., Smith, B., Moore, J., Jebb, J., Burton, J., Pennefather, B., and Vandeleur, J., being in favour of affirming, and Plunket, C. J., Johnson, J., and Torrens, J. in favour of reversing the judgment of the Court below. McClelland, B., was not present (*g*). To the same effect is illustration

(*e*) Bac. Abr. *Execution* (N) 5. 7th Ed.; *Roberts* v. *Thomas*, 6 T. R. 68; *Barker* v. *Braham*, 3 Wils. 368, *per* DeGrey, C.J., p. 376.

(*f*) 5 Bligh. N. S. 154. S. C. 2 Dow. & Cl. 288. (*g*) 2 Hud. & B. 522.

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(*a*) of Section 223 of the Indian Contract Act, 1872. One of the reasons for the greater frequency in England of actions for wrongful seizures against Sheriffs than against judgment-creditors, is that the writ of *fieri facias* is addressed to the Sheriff in general terms—thus: "We command you that of the goods and chattels of *A. B.* in your bailiwick, you cause to be made (*fieri facias*) £20 which *C. D.* lately in our Court before us at Westminster recovered against him for his damages," &c., and it is not always known to the injured party whether the goods wrongfully seized were pointed out to the Sheriff by the judgment-creditor, or easy to prove that such was the fact, so the simpler course is to sue the Sheriff (*h*), who is a solvent person, and who, unless specially ordered by the Court, which he rarely would be, to seize specific chattels, is a trespasser, if the goods seized be not those of the debtor, and cannot, when directed by the *fieri facias* to levy the debt out of the goods of *A. B.*, justify under that writ a seizure of goods belonging to another person. In India, however, the warrant is more usually special than general, being ordinarily issued upon an application for the attachment of particular property named in it, and thus the judgment-creditor becomes responsible if those goods be not those of his debtor. The officer of the Court may always make the judgment-creditor responsible by declining to seize any goods until the latter or his agent points them out as the property of the debtor. In that case, the officer will protect himself even when the warrant is general, for although, if under such warrant, he take goods not the property of the debtor, and the officer should become liable to the rightful owner, yet, as already shown, the officer may recover from the judgment-creditor, as damages occasioned by his misrepresentation, any damages which he (the officer) has been compelled to pay to the true owner of the goods for the wrongful seizure. It must be recollected, however, that what we are discussing here is the question as

(*h*) See *per* Peacock, C.J., 3 Calc. W. R. Misc. 14 as to the difference between a Nazar and a Sheriff.

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to the extent of the liability of the Indian judgment-creditor and not that of the Nazar or other officer of Indian Mofussil Civil Courts. We have pointed out how the Nazar or other officer may certainly avoid liability, or if he have incurred it, may recoup himself, but it is unnecessary for us now to discuss the extent of his liability, and we refrain from expressing any opinion upon it. In Bengal, a strong distinction has been taken between the liability of an English Sheriff and a Bengal Nazar or Court peon, partly founded on the Bengal Act V. of 1863—see 11 Beng. L. R. 256.

The learned District Judge has referred to a former case, (which came before the High Court on appeal from his decision) *Dámodhar* v. *Lallu* (*i*), in which he stated his view to be that, there being no allegation of malice on the part of the execution-creditor, or that he knew that the goods seized were not those of his judgment-debtor, the wrongful seizure was *damnum absque injuria*, and no action was sustainable by the owner against the execution-creditor. In support of that view, *Davies* v. *Jenkins* (*j*) was cited to the High Court (*k*), but the decision in *Davies* v. *Jenkins* (which was an action against the attorney of the execution-creditor) did not support that opinion. It was argued upon a demurrer to a declaration in case not in trespass. It was admitted by the Court that an action of trespass would lie against the Sheriff, and it was not decided or hinted that an action of trespass would not lie against the execution-creditor himself, but it was held that, in the absence of an allegation of malice, an action *on the case* would not lie against the execution-creditor's attorney. In *Barker v. Braham* (*l*) an action of trespass for false imprisonment was sustained against both the attorney and the client.

In *Dámodhar* v. *Lallu*, as I understand the report of that case, the execution-creditor Lallu would seem to have specially applied for the attachment of the boat, which turned out

(*i*) 8 Bom. H. C. Rep. A. C. J. 177.
(*j*) 11 M. & W. 745.
(*k*) 8 Bom. H. C. Rep. A. C. J. 179.
(*l*) 3 Wilson 368. See also *Bates* v. *Pilling* *infra*.

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not to be the property of his debtor, Degin, and, in his written statement, Lallu persisted in alleging that the boat was the property of the debtor, and not that of Dámodhar. The decision of the High Court proceeded on the assumption that the attachment of the boat was specially caused by Lallu, the judgment-creditor himself, and that it was not the mistake of the officer of the Court proceeding upon a general warrant of attachment. There is, therefore, no such conflict as the District Judge seems to think, between that decision and the unreported decision in *Khemá* v. *Degumiyá* (*m*), also mentioned by him, where the *bajri* and *kulith* had been rightly attached, inasmuch as the judgment-debtor had an undivided half share in it, and the damage, which occurred to it while in the custody of the *Nazar* (*n*), and of which the plaintiff, who had the other half share, complained, was not in anywise occasioned by the conduct of the execution-creditor. *Kálu Visáji* v. *Dámodhar Govind* (*o*), also mentioned by the learned Judge, was decided upon a question not arising in the present case, and, in so far as it refers to the liability of the execution-creditor to the owner of goods wrongfully seized, is a mere enumeration of authorities on that question, upon which I neither expressed, nor intended then to express, any opinion.

The learned Judge has stated his belief to be that the doctrine in this Presidency, prior to *Dámodhar* v. *Lallu*, was against the liability of the judgment-creditor for a wrongful seizure. He has not referred to any cases in support of that impression. There are, however, cases which lead to the opposite conclusion. In Special Appeal No. 417 of 1861, *Gosái Náná* v. *Lálbhái Náranji*, Hebbert and Newton, JJ., on the 16th April 1863, in a suit to recover damages caused by the sale of a house under a decree against a person not the owner of the house, held that the execution-

(*m*) Civil referred case 28 of 1872. See also *Rájballab Gope* v. *Issan Chander Hajráh*. 7 Calc. W. R. Civ. Rul. 355, the head-note of which is too wide. See the remark on that case by Norman, J., in 3 Beng. L. R. 419, 420 ; and see 5 Beng. L. R. Appx. 73.

(*n*) Se Sec. 233 Civ. Proc. Code. (*o*.) 9 Bom. H. C. R. 92

creditor, Lálbhái, was liable, and reversed the decree of the District Judge of Surat, who had reversed that of the Munsif at Bárdoli, which latter decree had awarded damages to the plaintiff against the execution-creditor. One of the points of special appeal there was "that there is no law which precludes a person, who does not sue to raise the attachment, from suing to obtain damages from the individual who wrongly put up appellant's property for auction, and the liability of the wrong-doer is not affected by the sale of the property. See Special Appeals Nos. 13 and 31 of the certified list." In Special Appeal No. 3 of 1866, *Káshináth Balál Ok* v. *Jetu. Kálu*, decided on the 10th July 1866, Tucker and Gibbs, JJ., affirmed the decree of Mr. Izon, Acting Assistant Judge of Tanna, which affirmed that of the Munsif of Kalyán, whereby he awarded damages against an execution-creditor, the special appellant, for attaching certain immoveable and moveable property not belonging to his judgment-debtor. Amongst the points of special appeal were the following: "That the appellant was not liable in damages to the respondent (the owner of the property); that the sale being confined to the right, title, and interest of the judgment-debtor, the appellant could not be held responsible, if the judgment-debtor should prove to have no right, title, or interest in the same; that there was no irregularity in the sale of the property so as to give rise to a claim for damages under Sec. 252 of the Civil Procedure Code."

In Special Appeals 619, 613, and 685 of 1864, which all arose in one original suit brought by the owner of immoveable property against the execution-creditor, who had caused it to be sold, and also against the purchasers, the Sadr Amín at Ahmedabad decreed that the purchasers should restore the property to the owner, and that, if he failed to recover it from them, the execution-creditor should pay him damages to the extent of the value of it. The District Judge, Mr. Cameron, reversed so much of the decree as affected the execution-creditor, but the High Court (Couch, C.J., and

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Newton and Warden, JJ.) upon the 17th January 1865 restored the decree of the Sadr Amín.

In the cases above referred to (Special Appeal 417 of 1861, Special Appeal 3 of 1866, and Special Appeals 619, 643, and 685 of 1864), as resting upon a doctrine with respect to the liability of the execution-creditor different from that supposed by the District Judge to prevail in this presidency, there was immoveable property sold in execution, and there must, therefore, so far as that property was concerned, have been in each a special application for attachment under Sec. 213 of the Code. We have not any reason to believe that in the only one of them (Special Appeal 3 of 1866), in which moveable property was also sold, it was not the subject of a special application for attachment under Sec. 214. In fact, the papers in that case, which I have examined, lead me to the contrary inference.

*Tamizuddin Mulla* v. *Nyanutulla Sirkar* (*p*), in which the execution-creditor was not held liable, proceeded on the ground that one moiety of the undivided chattel, belonging to the debtor, was rightfully sold, and that his right, title, and interest only having been sold, the remedy for the owner of the other moiety, in the event of the purchaser of the first mentioned moiety converting the other moiety to his own use, would be against that purchaser only. That case is of the same class as *Khemá* v. *Degumiyá* (*q*) and *Rájballab Gope* v. *Issan Chunder* (*r*), which are clearly distinguishable from, and do not conflict with, the authorities, which establish the general doctrine that the execution-creditor is liable for a wrongful attachment or sale, *made at his instance or at that of his agent.*

Of that doctrine *Mt. Subjan Bibi* v. *Sheikh Sariatulla* (*s*) is a clear instance. There the Court (Norman and E. Jackson, JJ.,) held the execution-creditor liable for damages arising from the seizure and detention of cattle, which were acts done by the officer of the Court at the instance of

(*p*) 5 Beng. L. R. Appx, 73.
(*q*) Supra.
(*r*) 7 Calc. W. R. 355.
(*s*) 3 Beng. L. R. 413.

the execution-creditor, but not for the value of three bullocks (part of those seized), which had died during the detention, but whose deaths were not shown to be in any way directly attributable to the act of the execution-creditor in causing them to be seized and detained. The extent of the liability of the execution-creditor was well discussed there by the Court. That case was followed in *Kanái Prasád Bose* v. *Hiráchand Mánu* (*t*), where, although it was admitted by the Court that the execution-creditor, who had caused the seizure of an elephant not the property of his debtor, had acted "in perfect good faith," yet the execution-creditor was held liable in damages to the rightful owner.

This doctrine is supported by English authorities. Of these *Jarmain* v. *Hooper* (*u*) is especially deserving of attention. The execution-creditor had obtained a judgment against Joseph Jarmain, the son of Joseph Jarmain, and the attorney of the execution-creditor, by mistake, informed the Sheriff of Middlesex that the judgment-debtor resided at 3, Prospect Place, Church Street, Chelsea, which was, however, in fact the residence of the debtor's father. That information was so given by the attorney by way of indorsement on the writ of *fieri facias*, sued out of the Court of Common Pleas by him and delivered for execution to the Sheriff, who proceeded to No. 3, Prospect Place, Church Street, Chelsea, and seized the goods of the father, who thereupon sued the Sheriff and the execution-creditor (Heenan) in an action of trespass. For the Sheriff, it was contended that, inasmuch as the writ was against Joseph Jarmain simply, not adding "the younger," it should *primâ facie* be taken to mean Joseph Jarmain, the father, and, therefore, that the Sheriff was protected by the writ. For the execution-creditor, it was argued that, inasmuch as he had not interfered in the original action further than giving instructions to his

(*t*) 5 Beng. L. R. Appx. 71.

(*u*) 6 Man. and Gr. 827 S. C. 1 D. and L. 769. 7 Scott N. R. 663. See also *Coomer* v. *Latham*, 16 M. and W. 713, *Wally* v. *McConnell*, 13 Q. B. 903.

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attorney to sue Joseph Jarmain, the son, he was not liable for the wrongful seizure occasioned by the erroneous information given by his attorney in pure mistake. But the Court held both the Sheriff and the execution-creditor to be liable. As to the Sheriff, Tindal, C.J., said:—"Although, therefore the want of the addition ("the younger") imports, *primâ facie*, that the son is not intended, it is no more than a *primâ facie* intendment, for the son may be the person really intended by the writ. The situation, therefore, of the Sheriff, under such a state of circumstances, seems to be the same as if he had received a writ against a defendant described by the name of J. S. in the writ, and there appeared, at the time of executing the writ, to be two persons of the name of J. S., in which case there can be no doubt but that the Sheriff would be liable, if, through inadvertency or mistake, he took the person or the goods of the wrong J. S. The authorities from the Year Books, cited in 2 Rolle's Abridgment, 552, l. 17, 25, and 30, are clear and express to that point, in the last of which references it is laid down that the Sheriff is liable though the taking be by the showing of the party to the suit." With regard to the execution-creditor, Tindal, C.J., said:—"As to the Defendant Heenan, the only question in his case is, whether he is bound by the act of his attorney, in giving the directions to the Sheriff to take the goods of the plaintiff. That the plaintiff in the original action is liable in trespass, if, by *his own* order, the Sheriff takes the goods of a stranger in execution, is clear law, 2 Rolle's Abr. 553, l. 10, pl. 5. And it appears to us that the direction, given by the attorney, is a direction given by an agent within the scope of his authority, and binds the principal (*v*). The attorney has the general conduct of the cause; he is the only person with whom the Sheriff has communication: and, in taking a step essentially for the benefit of his client, that is, for the obtaining the fruit of his judgment, we think that he cannot be held to have acted beyond his authority, though he has

(*v*) *See* per Tindal, C.J., in *Wilson* v. *Tumman*, 6. Man. and Gr. 244 to the same effect; and S. C. 6 Scott N. R. 905.

miscarried in its execution, and, when it is argued that he cannot be his agent in giving *false* information, the answer is that, if he be his agent to do the particular act, the client must stand to the consequences if he act inadvertently or ignorantly; as in *Parsons* v. *Lloyd* (*w*), where trespass was held maintainable against the client for causing the plaintiff to be arrested under a writ which was afterwards set aside for irregularity. It was argued, in that case, that suing out the writ was the immediate act of the attorney, that he had not been retained to sue out a void or irregular writ, and that it was, therefore, not within the scope of his authority. But it was answered by DeGrey, C.J., that 'the act of the attorney is the act of his client'; and by Gould, J., 'the plaintiff should have employed a more skilful and diligent attorney, for the act of the attorney, in point of law, is the act of the party his client'."

The agency of the attorney for the client and the responsibility of both were strongly exemplified in *Bates* v. *Pilling* (*x*). *A* employed *B*, an attorney, to enforce payment of a debt. *B* directed his agent to sue out a *justicies* in the County Court. Before the return of the *justicies*, the debtor paid the debt and costs to *B*. His agent, not knowing of such payment, afterwards entered up judgment in the County Court, although the defendant had not appeared, and sued out execution under which the goods of the debtor were seized. It was held that an action of trespass lay against both *A*, the client, and *B*, the attorney. Abbott, C.J., said that *A*, the original plaintiff, was answerable for the act of *B*, his attorney, and that *B* and his agent should be considered as one person, and, that being so, according to *Barke* v. *Braham*, the client and the attorney were liable as trespassers.

In *Barker* v. *Braham* (*y*) DeGrey, C.J., said: "A Sheriff or his officers, or any acting under his or their authority, may" (*i.e.*, if they strictly pursue the exigency of the writ)

(*w*) 3 Wilson 341. (*x*) 6 B. and C. 38.
(*y*) 3 Wils. 376.

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"justify themselves by pleading the writ only, because *that* is sufficient for their excuse, although there be no judgment or record to support or warrant such writ; but if a stranger interposes and sets the Sheriff to do an execution, he must take care to find a record that warrants the writ, and must plead it; so must the party himself, at whose suit such an execution is made (*z*). No trespass can be excused but what is inevitable; see the case of *Parsons* v. *Lloyd*, adjudged in the last term." And again he said: "to apply what is said and laid down in the books upon this subject to the present case; they say, whoever procures, commands, assists, assents, &c., is a trespasser; here the client commands the attorney, the attorney *actually* commands the Sheriff's officer; the real commander is the attorney, the nominal commander is the plaintiff in the action" (*i.e.*, the execution-creditor) "so attorney and client are both principals."

In the case referred to us by the District Judge, there may have been, and probably was, a warrant to seize the rice in husk, which warrant would protect the officer of the Court, but there was not any decree to support the warrant. There was a decree against Jatkyá, but that would not support a warrant to seize rice which belongs to Hatá Dipáji, the respondent, and inasmuch as the seizure was made at the instance of Váná, the execution-creditor (appellant), he has committed a trespass and is responsible in damages to Hatá Dipáji.

*Cronshaw* v. *Chapman* (*aa*) does not conflict with this view. It is true that a letter of ambiguous character was there written by the execution-creditor to the bailiff, but the Court held that it did not direct the bailiff to do anything more than his ordinary duty under a *fieri facias*, which, being against the goods of J. C., did not warrant a seizure of the goods of T. C., and there being no sufficient evidence to show that the latter seizure was made at the instance of the execution-creditor, he was held not liable.

(*z*) See *Brooks* v. *Hodgkinson* 29 L. J. Exch. 93.

(*aa*) 31 L. J. Exch. 277.

*Walker* v. *Odling* (*bb*) and *Woollam* v. *Wright* (*cc*) do not aid the execution-creditor here. They show that an execution-creditor is not liable for a sale by the Sheriff under an inter pleader order, and in *Waler* v. *Odling* the rightful owner of the goods recovered damages in respect of a seizure and detention at the instance of the execution-debtor, but not for the subsequent sale under the interpleader order, made at the instance of the Sheriff after the seizure and during the detention. That order was held to be not "so direct a consequence of any act" of the execution-creditor as to render him liable. *Lock* v. *Ashton* (*dd*) proceeded upon a similar principle, the defendant being held not liable for a remand, which was the judicial act of the Magistrate.

We are of opinion that the decree of the District Judge should be reversed by him, and that he should restore the decree of the Subordinate Judge, and direct the defendant, Váná Jagannáthji, to pay the costs of the suit and appeal and of this reference, if any.

We are much indebted to Mr. Dhirajlál Mathurádás and Mr. Shántárám Náráyan for their able arguments in this case, made *pro bono publico et sine honorario, sed non sine honore.*

(*bb*) 1 Hurl. and C. 621. (*cc*) *Ibid* 554.

(*dd*) 12 Q. B. 871.

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[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No.* 215 *of* 1873.

GULA'BCHAND MA'NIKCHAND.....*Appellant.*

DHONDI VALAD BHA'U .....*Respondent.*

*Mortgage—Pendente lite.*

The rule *pendente lite nihil innovetur* is in force in British India.

Therefore, where the owner of a house, during the pendency of a suit by an unregistered mortgagee for foreclosure and sale, mortgaged the same house by a registered mortgage to another person, it was held that the last mentioned mortgagee had no title as against the purchaser under a decree for sale in the suit, although such purchaser was the plaintiff in the suit.

A grantee or vendee of the defendant, becoming such during the pendency of the suit, need not to be made a party to the suit, and, inasmuch as the first above-mentioned rule does not rest upon the equitable doctrine as to notice, it is a matter of indifference whether or not, at the time of his becoming grantee or vendee, he had actual notice of the existence of the suit.

THIS was a special appeal from the decision of E. F. Candy, Extra Assistant Judge at Tanna, affirming the decree of the Subordinate Judge of Sinnar.

The special appeal was argued before WESTROPP, C.J., and PINHEY, J., on the 17th November 1873.

*Shántárám Náráyan* for the appellant.

*Máhádev Chimnáji Apte*, contra.

The facts of the case fully appear from the following judgment delivered by

WESTROPP, C.J. :—In this case, Sakhu, the widow of Tukárám, and Dhondu, the son of Tukárám, by deed, dated the 10th November 1866, mortgaged a house, for Rs. 15, to Gulábchand Mánikchand, the defendant in this suit and present special appellant, who instituted, on the 8th July 1869, against those mortgagors and a third party, a suit for the enforcement of his mortgage, which instrument has never been registered. On the 26th of October 1869, he obtained

a decree for the amount due to him, viz., Rs. 30, principal and interest, and Rs. 11 costs, and that decree contained a direction that the house, the subject of the mortgage, should, in default of payment by the mortgagors of the amount decreed, be sold in satisfaction of the sum so found due on the mortgage for principal, interest, and costs. That amount not having been paid, the house was, on the 25th July 1870, sold by the Court, in pursuance of the decree, to Gulábchand Mánikchand, who himself became the purchaser, and it is admitted that, as such, he was then put into possession of the house. The present plaintiff and respondent, Dhondi valad Bháu Pátil, claims under Exhibit No. 3, which is a mortgage of the same house to him for the sum of Rs. 251, executed by Sakhu and Dhondu Tukárám, on the 26th of July 1869, and registered on the same day. It is admitted that the consideration for that mortgage consisted of an unregistered mortgage bond, dated 3rd May 1868, of the same house for the sum of Rs. 99 (Exhibit 25), and of two ordinary money bonds of the same date, which, in the aggregate, together with the mortgage bond for Rs. 99, amounted to Rs. 216. That sum together with interest amounted to Rs. 251, then said to be due, and it is admitted that no fresh advance or new consideration was given for the registered mortgage bond of the 26th July 1869.

Under these circumstances, the present plaintiff, Dhondi valad Bháu Pátil, instituted this suit against Sakhu, Dhondu, and Gulábchand to recover the amount of the registered mortgage (Exhibit No. 3), or to be put into possession of the house.

The defendant, Gulábchand, relied on the priority of his unregistered mortgage of the 10th November 1866, on the decree made in the suit which was instituted by him on that mortgage before the execution of the registered mortgage to the plaintiff, and on his purchase under that decree.

The Subordinate Judge and the Assistant Judge have respectively decreed in favour of the plaintiff; the Assistant

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Judge saying that both defendant Gulábchand's unregistered mortgage of 1866 and plaintiff's registered mortgage of 1869 were without possession, and that, as regarded the plaintiff's mortgage, its registration cured that defect.

The defendant, Gulábchand, has made a special appeal to this Court, and we do not think that the right view of this case has been taken in the Courts below. Those Courts do not seem to have had sufficient regard to the circumstance that the registered mortgage, on which the plaintiff relies, was executed subsequently to the institution of the suit of Gulábchand, or to have attended to the rule, which prevails as well at law as in equity, as to transactions entered into during the pendency of litigation, or to the kindred provisions of Sec. 223 of the Civil Procedure Code. The plaintiff could not, as against Gulábchand, rely on the unregistered mortgage of the 3rd May 1868 to him, inasmuch as it was puisne in date to the unregistered mortgage of the 10th November 1866 to Gulábchand, and, as to registration, stood in no better position.

The plaintiff's registered mortgage of the 26th July 1869, was executed during the pendency of Gulábchand's suit against the mortgagors, which commenced upon the 8th July 1869, and must, therefore, whether the plaintiff did or did not give valuable consideration for that mortgage, and whether he had or had not, at the time of the execution of that mortgage, any knowledge of the existence of Gulábchand's suit, be regarded as subject to the decree which might be pronounced in that suit. This is so as well in England as in India.

The rule is *pendente lite nihil innovetur* (*a*). It is a rule which does not rest on the equitable doctrine as to notice, although in some of the authorities it has been rested upon that doctrine. The better opinion is that it rests upon the inability of the defendant to give, as against the plaintiff, a title during the existence of a suit brought to enforce a specific lien against or purchase of the property. Sir Thomas

(*a*) Co. Lit. 344. 2 Inst. 376.

Plumer, M.R., in *Metcalfe* v. *Pulvertoft* (*b*) said that "the true interpretation of this rule is, that the conveyance does not vary the rights of the parties in the suit; that it gives no better right, having no effect with reference to any beneficial result against the plaintiff in that suit; and it is very reasonable that the litigating parties should be exempted from the necessity of taking notice of a title, acquired under such circumstances. With regard to them it is as if it had never existed: otherwise suits would be interminable; if one party pending the suit could by conveying to others create a necessity for introducing new parties. The voluntary act, therefore, of the defendant conveying to another, cannot vary the situation or affect the right of the plaintiff." The same views were still more forcibly inculcated in *Bellamy* v. *Sabine* (*c*) by Lord Cranworth and Lord Justice Turner. In England the rule has, of late, been narrowed by the Stat. 2 Vic., C. 11, which enacts that a *lis pendens*, unless duly registered, shall not affect a purchaser without express notice. There is not any similar enactment in British India. The rule, as it existed in England before the Stat. 2 Vic., C. 11, prevails here: *Kasim Shaw* v. *Unnadapersaud Chatterji* (*d*) and 7 Calc. W. R. 225, Civ. Rul.; Calc. W. R. Special Number for 1864 F. B. 40; 7 Mad. H. C. Rep. 104. Sec. 223 of Act VIII. of 1859 is founded upon that rule.

It follows hence that, even upon the assumption that the present plaintiff had given valuable consideration for his mortgage of the 26th July 1869, and that he had not any notice either of the defendant Gulábchand's earlier mortgage of the 10th November 1866, or of his suit of the 8th July 1869 to enforce that mortgage, the defendant Gulábchand's title, as purchaser in that suit, must prevail against, and is paramount to, the plaintiff's title as mortgagee. The registration of the plaintiff's mortgage cannot affect the rule that

(*b*) 2 Ves. & B. 200, 205 (*c*) 1 De G. & Jones, 566, S. C. 21 L. J. Ch. 797, N. S. And see *Bishop of Winchester* v. *Paine*, 11 Ves. 194.

(*d*) 1 Hyde 100.

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he, who accepts a special lien or purchases from a defendant *pendente lite*, does so subject to the decree which may be made in the suit which is pending.

But we cannot take so favourable a view of the facts of the plaintiff's case as above assumed. It is admitted that there was not any new consideration given by the plaintiff to Sakhu and Dhondu Tukárám for the registered mortgage of the 26th July 1869, the consideration for which was only the money remaining due, upon the plaintiff's unregistered mortgage of 1868 and the two money bonds, for principal and interest, all of which securities were of later date than that of the unregistered mortgage to Gulábchand. We regard the giving and taking of the registered mortgage as a collusive act on the part of Sakhu, Dhondu Tukárám, and the plaintiff for the purpose of conferring a technical priority upon the plaintiff's claims. We have no doubt that the plaintiff was then well aware of Gulábchand's mortgage and of his suit. The plaintiff will now, we trust, perceive how much a better course it would have been for him to have redeemed the property, as he might have done before the judicial sale to Gulábchand, the prior mortgagee, by payment of the moderate sum of Rs. 41 for principal, interest, and costs, than to have resorted to the illusory and abortive attempt to gain priority over him and so get rid of his claim altogether.

There is a further difficulty in the path of the plaintiff, who has no document on which he has any pretence for relying against Gulábchand except the registered mortgage of the 26th July 1869. It was contended for Gulábchand that the mortgage of 1869, being, on the face of it, for a consideration exceeding Rs. 100, does not fall within Sec. 50 of Act XX. of 1866, which, it is said, provides for the priority only, over unregistered instruments executed for a consideration less than Rs. 100, of registered instruments "of the kinds" mentioned in Cls. 1, 2, and 3 of Sec. 18 of the same Act, which are inapplicable to a registered mortgage executed for a consideration exceeding Rs. 100. It is unnecessary, however, for us to deal with that question, as we are satisfied with

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the sufficiency of the first ground, which we have mentioned, viz., that the plaintiff, having taken his mortgage of 1869 during the pendency of Gulábchand's suit against Sahku and Dhondu Tukárám, did so subject to the decree which might be made in that suit, and therefore that the sale under that decree to Gulábchand is completely valid against the plaintiff. We, accordingly, reverse the decrees of the Subordinate Judge and of the Assistant Judge, and direct the plaintiff (special respondent) Dhondi valad Bháu Pátil to pay the costs of the suit and of both appeals.

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[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No.* 189 *of* 1874.

1874. Aug. 26.

TRIMBAK DIXIT ..... *(Defendant) Appellant.*
NA'RA'YAN DIXIT ..... *(Plaintiff) Respondent.*

*Undivided Hindu family—Suit by one co-parcener against the others for a declaration of his right to a Government cash allowance forming part of the undivided estate—Partition.*

One member of an undivided family cannot sue his co-parceners for a declaration that he is entitled to recover the whole of a family *Varshásan*. The only mode in which, as between the members of the joint family, a declaration of right to the *Varshásan* can be properly obtained is by one of the co-parceners bringing a suit for partition of the whole of the family estate, including the *Varshásan*, and for a declaration of the shares of the respective co-parceners.

THIS was a special appeal from the decision of C. F. Shaw, District Judge of Belgaum, reversing the decree of Váman Parsharám, Subordinate Judge of Chikodi.

The facts of the case, so far as they are material to this report, are these:—

The plaintiff, Náráyan Dixit, and the defendant, Trimbak Dixit, were members of a joint Hindu family, to which a certain *Varshásan* (annual cash allowance) of Rs. 14 was payable every year from the Government treasury of the Gokák Taluka. The *Varshásan* was paid to the family up to 1817-18. In 1850 the Inam Commission commenced an inquiry into the claim of the family to the *Varshásan*, and, as a

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dispute arose between the plaintiff and defendant, each claiming the right to receive it himself exclusively, the Mámlatdár of Gokák, under date the 10th January 1870, issued an order to the plaintiff to the effect that the payment of the *Varshásan* would be withheld till it was decided by a civil suit which of the claimants was entitled to receive it. The plaintiff, therefore, brought this suit for a declaration that he had an exclusive right to the enjoyment of the *Varshásan* as against the defendant.

The Subordinate Judge threw out the plaintiff's claim on the ground that the action was barred by the law of limitation in consequence of the defendant's long enjoyment of the *Varshásan*. In appeal, that decree was reversed by the District Judge, who held the plaintiff entitled to receive payment of the whole *Varshásan*, on the ground that the defendant was not proved ever to have enjoyed adverse possession of it, and the plaintiff appeared to be the person who last received payment. The Judge also declined to declare the defendant entitled to any share in the unpaid arrears of the *Varshásan*, on the ground that such a declaration might compromise the defendant's claim to a formal partition, the family being admittedly undivided.

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J.

*Vishnu Ghanashám* for the appellant :—It has been repeatedly decided both by the present High Court and by the late Sadar Adawlat that no member of a joint Hindu family can sue for a portion of the family property; but he must sue for a general partition of the whole estate of the family (*a*).

*Janárdan Sakhárám Gádgil* for the respondent :—The present suit must not be considered as a partition suit for a portion of the family property. As Government refused to pay the *Varshásan* in consequence of the dispute between the plaintiff and defendant, the plaintiff was forced to go to the civil court for a declaration of the kind he prays, and seeks to recover the *Varshásan* from Government on behalf of the

(*a*) Selected cases (Bombay S. D. A.) pp. 151, 190.

family. Otherwise it would remain in the possession of the Government, and the claim to it would be barred. [*Westropp, O.J.*—As the parties are admittedly undivided members of a Hindu family, it cannot be said that either of them has any defined share in the family property till a division actually takes place, and defines the shares of the different co-parceners.]

The judgment of the Court was delivered by

WESTROPP, C. J:—The parties on both sides are admittedly members of an undivided family, and the *Varshásan*, the subject of this suit, is part, and part only, of the family estate Under such circumstances, this suit, which is substantially one seeking a declaration that Náráyan, the plaintiff (respondent), is entitled, as against the defendant Trimbak, to recover the whole of the *Varshásan*, is wholly unsustainable It is opposed to the admitted position and rights of the respective parties to this suit. It may or may not be that the defendant Trimbak, on a partition, would be entitled to a smaller share than the plaintiff, but, howsoever that may be, it cannot render a suit, in which the plaintiff seeks to recover the whole of the *Varshásan*, sustainable. The only mode in which, as between the members of the family, a declaration of right to this *Varshásan* (as to which the co-parceners are asserting their respective rights and cannot come to an arrangement that it should be received on behalf of the whole family by a mutual nominee) can be properly obtained, is by one of the co-parceners bringing a suit for partition of the whole of the family estate, including the *Varshásan*, and for a declaration of the shares of the respective co-parceners. A suit will not lie for a partition of the *Varshásan* alone: *Nánábhái* v. *Náthábhái* (*b*), *Náráyan* v. *Náná* (*c*). This Court, on the above grounds only, and without adopting the reasons of the Subordinate Judge, reverses the decree of the District Judge, and rejects the suit of the plaintiff with costs of the same and of both appeals.

(*a*) Selected cases (Bombay S. D. A.) pp. 151, 190.

(*b*) 7 Bom. H. C. Rep. 46 A. C. J.

(*c*) *Id. Ib.* 153 A. C. J. see p. 178.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal* No. 89 *of* 1874.

1874. Aug. 18.

PA'NDURANG A'NANDRA'V.....(*Defendant*) *Appellant.*

BHA'SKAR SHADA'SHIV .....(*Plaintiff*) *Respondent.*

*Undivided Hindu family—Ancestral estate—Mortgage by some of the co-parceners of a portion of the undivided estate—Attachment and sale of the interest of one of the co-parceners in the undivided estate—Limitation—Partition.*

In 1848 two members of an undivided Hindu family mortgaged some land forming a portion of the ancestral estate. The mortgagee, having obtained a decree in 1856 on his mortgage, caused 20 *guntas* of the mortgaged land to be attached and sold, on account of the right and interest of one of the mortgagors only, on 24th January 1871. In a suit brought by the purchaser against a third member of the undivided family, in whose possession the 20 *guntas* then were, to recover the same from him, as being the property of the mortgagor, whose right and interest therein had been attached and sold :

*Held*, 1*st*.—That the purchaser could take no more than the share of the co-parcener whose interest alone had been attached and sold, though this share might be defined as it existed at the time of the mortgage made by him in 1848.

2*nd*.—That as between the purchaser and the defendant, in determining whether the latter had been in sole and exclusive possession for a period sufficient to bar the right of the former, the rule of limitation applicable is that which would have been applied between the co-parcener whose interest had been sold and the defendant, had the former been suing for possession of the land or a portion of it.

3*rd*.—That the share of a co-parcener, being in the estate as a whole and not in any particular part of it, can be ascertained only by taking a general account of the whole estate, and making a distribution in accordance with the results of such account. In taking such account, however, and in making the consequent distribution, it would be only equitable that the share of the co-parcener who affected to deal with a portion of the land as if empowered to mortgage it should, *ceteris paribus*, if the purchaser takes his place, be so made up as to embrace wholly, or so far as possible, the land which the purchaser bought as belonging to such co-parcener.

4*th*.—That to obtain possession of the land purchased by himself, the purchaser must file against the other members of the family a partition

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suit for the ascertainment of the share of the co-parcener, whose interest he has purchased, as it stood in 1848, and for the allotment to himself of that share so far as it can legally and equitably be identified with the land purchased by himself, and that, consequently, the suit in its present form will not lie.

THIS was a special appeal from the decree of W. M. Coghlan, District Judge of Tanna, reversing the decision of Mahádeo Chimnájee A'pte, Subordinate Judge at Alibág, who had rejected the plaintiff's claim with costs.

The special appeal was argued before WEST and NA'NA'BHAI HA'RIDA'S, JJ.

*Dhirjálal Mathurádás*, for the appellant:—The mortgage deed executed by two members only of an undivided family is not binding on the defendant who was no party to it. The execution sale was of the right, title, and interest of one of the mortgagors only. The defendant having been in exclusive possession of the land in question as the owner for 19 years, the suit is barred: *Gokalbhái* v. *Jháver* (*a*).

*Vishnu Ganeshám*, for the respondent:—The execution sale in 1871 was an out-and-out sale of the mortgagor's interest as it existed at the date of the mortgage in 1848.

WEST, J.:—The suit in the present case was brought by Bháskar as purchaser at an execution sale of the interest of Nilo in 20 *guntas* of land. This land had formed part of a quantity mortgaged in 1848 by Nilo and Amritráv, and was sold in execution of a decree obtained on the mortgage in a suit against Nilo and Amrit. On a sale and a certificate relating to Nilo's interest alone, Bháskar could take no more than Nilo's share, though this share might be defined as it existed at the time of the mortgage made by him in 1848. Pándurang, who was in possession of the 20 *guntas* set up an exclusive title to it, arising from sole possession, as he averred, for more than 30 years. Whether there had been this sole possession as proprietor to the exclusion of Nilo's right for such a length of time as would guard Pándurang's occupation against attack, was a question which should be determined between Bháskar and Pándurang by

(*a*) 8 Bom. H. C. Rep. 61, A. C. J.

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an application of the same rule of limitation that would have been applied between Nilo and Pándurang, had the former been seeking to obtain possession of the land in dispute, or a portion of it; but the position of Bháskar is to be identified with that of Nilo to a still further extent than this. Whether Nilo had any interest at all in the land in 1848, and if he had, what was the extent of that interest, are questions which, as there was other family property, do not admit of an answer without an inquiry into the extent and value of the joint property at large, the incumbrances resting on it, the members entitled to shares, and their respective aliquot portions. Nilo's share was not, supposing the family a united one, in any particular part of the estate, but in the estate as a whole, and could be ascertained only by taking a general account and making a distribution in accordance with its results.

In making such a distribution without advertence to the claims or interests of any third party, it might well happen that no part of the particular field now in dispute would be allotted to Nilo. But Nilo having affected to deal with this land as empowered to mortgage it, it would be only equitable that, *ceteris paribus*, his share should, if Bháskar takes his place, be so made up as to embrace wholly, or so far as possible, the 20 *guntas* which Bháskar has bought as his. It may be that his share will not be so much as 20 *guntas* or Pándurang may have a good reason to show why these 20 *guntas* are to be regarded as his own sole property, or as forming no part of the estate to a share of which Nilo was entitled in 1848; but unless some such obstacle should arise there seems no objection to Bháskar, who has bought all that Nilo is entitled to in the 20 *guntas* under the impression that the land was Nilo's only, being allowed to sue the other members of the family for an ascertainment of Nilo's share as it stood in 1848, and an allotment to him, as purchaser, of that share, so far as it can legally and equitably be identified with the 20 *guntas* put up to sale as Nilo's property.

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For this, however, another suit will be necessary. In the present suit, the plaintiff, Bhâskar, proceeded simply on the ground that Nilo had been the sole owner of the land bought by him at the execution sale. This by the very terms of the mortgage on which execution was had, Nilo was not; and no more was, or could be, sold than his rights as they appeared in the mortgage, those of a member of an undivided Hindu family.

We must, therefore, reverse the decree of the District Court with costs, but without prejudice to any suit which the plaintiff may bring in the proper form to give effect to his purchase of Nilo's interest as that of a member of an undivided Hindu family in the 20 *guntas* forming, as he avers, a part of the joint estate.

*Decree reversed.*

NOTE.—*Vishnu Ganesham*, for the respondent, applied, on 9th December 1874, for a review of the above judgment, on the ground that under the rulings of the High Court, the creditor of a single Hindu coparcener was allowed to attach and sell, not only his debtor's share in the entire family property, but his share in a particular portion of that property, and to have actual partition of such a portion : *Kalyanbhai* v. *Motiram* (*b*).

The Court, WEST and NA'NA'BHAI HA'RIDA'S, JJ., however, rejected the application, observing that the authority cited in support of the application was a mere *obiter dictum* and not a ruling, and that the Court's decision sought to be reviewed was supported by the rulings of the Bengal High Court in *Baboo Lall Jha* v. *Shaik Juma Buksh* (*c*) and *Kalee Pudo Banerjee* v. *Choitum Pandah* (*d*), and of the Privy Council in *Syud Tuffzul Hossein Khan* v. *Rughoonath Pershad* (*e*).

(*b*) 10 Bom. H. C Rep. 378. (*c*) 22 Calc. W. Rep. 116.

(*d*) Idem 216. (*e*) 14 Moo. I. A. 50 ; S.C. 7 Beng. L. R. 196 P. C.

1875.
January 15.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 279 of 1874.*

UDARA'M SITA'RA'M..... (*Defendant*) *Appellant.*

RA'NU PA'NDUJI AND VENKU PA'NDUJI ..... (*Plaintiffs*) *Respondents.*

*Undivided Hindu family—Ancestral property—Alienation of his share by a co-parcener—Attachment of a share in ancestral property—Liability of a divided share in the hands of the heir for the debts of the deceased—Liability of the ancestral estate for the separate debt of a deceased co-parcener in an undivided Hindu family.*

In the Bombay Presidency, the share of one of the co-parceners in a Hindu undivided family in the ancestral estate may, before partition, be seized and sold in execution for his separate debt in his lifetime. Such a co-parcener cannot, however, by simple voluntary gift, or by devise, alienate his share to a stranger, so as to bind his surviving co-parceners after his decease.

The purchaser, mortgagee, or other alienee, for valuable consideration, of such an unascertained share, cannot, before partition, insist upon the possession of any particular portion of the undivided family estate.

The mortgagee or purchaser of a share in the undivided ancestral estate of a Hindu family takes such share subject to the prior charges or incumbrances affecting the family estate or that particular share.

If the mortgage or sale be of a special portion of the family property and possession of such portion can, on partition, be given to the mortgagee or purchaser, without injustice to prior incumbrancers or to co-parceners, it is the duty of the Court, making the partition, to give effect to the mortgage or sale, and so to marshal the family property among the co-parceners as to allot that portion, or so much of it as may be just, to the mortgagee or purchaser.

*Quære.*—Whether, in the event of it being impossible, consistently with the rights of others, to give possession of the portion mortgaged or sold to the mortgagee or purchaser, he would be entitled to be recouped out of such other portion as might, on partition, be allotted to the parcener whose share in the special portion had been mortgaged or sold.

The attachment of a parcener's share in the family property under an ordinary money decree should go against the share, right, title, and interest of the judgment-debtor in such parts of the family property (naming and describing them) as the judgment-creditor can specify, and against his share, right, title, and interest in all other parts of the family property.

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The divided share of a Hindu in property which previously belonged to the united family, is, after his decease, and while yet in the hands of his heir, assets for payment of the debts of the deceased.

The whole of the family undivided estate would generally, when in the hands of the sons or grandsons, be liable for the debts of the father or grandfather, and previously to the passing of Bombay Act VII. of 1866, the sons and grandsons were personally liable for the debts of the father or grandfather whether they received assets or not. But there is no authority for the converse, viz., that the father or grandfather is responsible for the debts of his son or grandson independently of the receipt of assets, unless he promise payment.

The proposition of Hindu law that debts follow the assets into whosesoever hands they come, must, generally speaking, be confined to separate estate, and the liability of undivided ancestral estate, in the hands of sons and grandsons, to the debts of the father or grandfather is exceptional.

Undivided family property is not, in the hands of surviving co-parceners, generally speaking, liable to the *separate* debt of a deceased co-parcener.

Where, therefore, a Hindu, undivided in estate from his father, died separately indebted to the plaintiffs, who obtained a decree against the father and wife of the deceased, as his legal heirs and representatives, to recover, from the estate and effects of the deceased, the amount of their debt and costs, and sought, in satisfaction of the decree, to attach a shop, which, during the lifetime of the deceased and subsequently to his death, had been in the possession of his father, there being no proof of any separate estate of the deceased having devolved upon his father: *Held* that, though the son was, during his life, jointly interested with his father in the shop as being ancestral property, his right had come into existence at his birth and died with him, and therefore the plaintiffs could not render the shop available for their claim.

*Kályánbhái* v. *Motirám Jomnádás* 10 Bom. H. C. Rep. 378; *Vásudev Bhat* v. *Venkatesh Sanbhav* 10 Bom. H. C. Rep. 139; and *Fakirappá* v. *Chanáppá* 10 Bom. H. C. Rep. 162; commented on and distinguished. *Goor Pershád* v. *Sheodin*, 4 N.-W. P. Rep. 137, approved.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Ahmadnagar, reversing, on appeal, the decision of the First Class Subordinate Judge of that place, who had dismissed, with costs, the plaintiffs' claim to attach a shop in the possession of the defendant in satisfaction of a decree obtained by them against him as the heir and legal representative of his deceased son, in respect of a separate debt due by the son to the plaintiffs.

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The special appeal was argued before WESTROPP, C.J., and WEST, J.

*Shántárám Náráyan* for the special appellant.

*Shivsankar*, for the special respondents, was called on by the Court to support the decree, and cited the following authorities in support of his contention :—*Sadabart Prasád Sahu* v. *Foolbash Koer* (*a*), *Goor Surun Doss* v. *Ram Surun Bhukut* (*b*), and *Kályánbhái* v. *Motiram* (*c*).

WEST, J., referred to *Goor Pershád* v. *Sheodeen* (*d*).

The facts sufficiently appear in the following judgment delivered by

WESTROPP, C.J. :—Dhondu died indebted to the present plaintiffs, who, after his death, brought a suit (No. 1960 of 1871) against his father, Udarám, and wife, Sonkábái, in which it was decreed, on the 4th August 1871, that the plain-

(*a*) 3 Beng. L. R. 31 F. B.—The passage of this judgment, relied on by the pleader for the respondent, was a *quære* expressed by Peacock, C.J., in delivering the judgment of the Full Bench, who, after citing from the Treatise of Yájnavalkyá (Edition of Roer and Montriou), Text No. 51, that "he who takes the property of one who leaves no son shall pay the debts," remarked (p. 36) : "According to this doctrine whoever succeeds to the property is liable, to the extent of that property, to pay the debts. I express no opinion on the subject, because the case has not been argued, and does not arise in the present suit."—*Ed.*

(*b*) 5 Calc. W. R. Civ. Rul. 54.—The judgment in this case, delivered by Trevor and Glover, JJ., was relied on as declaring the true exposition of the law as it prevails under the Mitakshara system to be that "sons have from the first a vested interest in ancestral property, and such interest is saleable at any time." But in this case the son, against whose share in the ancestral property execution was sought, was still alive.—*Ed.*

(*c*) 10 Bom. H. C. Rep. 378.—The passage relied on in this case was an *obiter dictum* (p. 380) of the Court (Melvill and Pinhey, JJ.), to the effect that by the judgments in *Vásudev Bhat* v. *Venkatesh* (10 Bom. H. C. Rep. 139) and *Fakiráppá* v. *Chanáppá*, (*Id. Ib.* 162) it was settled law in the Bombay Presidency that the creditor of a single co-parcener might sell his debtor's share, not only in the entire family property, but in a particular portion. See *Post.* p. 80.—*Ed.*

(*d*) 4 N.-W. P. Rep. 137.

tiffs should recover, from the property and effects of Dhondu, the sum of Rs. 445-6-0 for debt and costs.

Dhondu, up to the time of his death, was undivided in estate from his father, Udarám, who, during Dhondu's lifetime and subsequently to his decease, was in possession of a shop, inherited by Udarám from his father, Sitárám. In the suit No. 1960 of 1871, the plaintiffs had attached the right, title, and interest of Dhondu in the shop, but the Subordinate Judge, on the 20th April 1872, at the instance of Udarám, raised, under Section 246 of the Civil Procedure Code, that attachment. The plaintiffs, in their plaint in the present suit, filed on the 8th of April 1873, alleged that Dhondu and his father were equal co-parceners in the ancestral shop, and that, although there had not been any partition of estate between Dhondu and his father, Udarám, Dhondu's share therein was, after his death, liable in his father's hands to the amount of the decree in the former suit, and prayed a declaration to that effect against Udarám. It should be noted that it is not stated in the plaint whether or not the shop constituted the whole of the family ancestral estate. The importance of that remark will presently appear.

The Subordinate Judge being of opinion that, by virtue of Udarám's survivorship, the whole of the shop became revested in him, and that it was not, in his hands, liable for a separate debt of Dhondu, such as the claim in this and the former suit, dismissed this suit.

The District Judge has reversed that decision, and made a decree as prayed by the plaintiffs. Udarám has filed the present special appeal against that decree.

The District Judge, after stating that Dhondu, when alive, was entitled to an undivided moiety of the shop, proceeded to say:—"The interest of a co-parcener in undivided property has, for many years, been held, in this Presidency, to be liable to be attached and sold by his judgment-creditors." That proposition, which may be more fully stated thus: the share of a co-parcener, the member of a Hindu undivided family, may, before partition, be seized

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and sold in execution, in this Presidency, for his separate debt in his lifetime, is quite correct and is in perfect accordance with the authorities recognized by this Court in *Vásudev Bhat* v. *Venkatesh Sanbháv* (*e*), which case was itself maintained by a Full Bench in *Fakirápá* v. *Chanáppá* (*f*). In those cases, the previous decisions in *Dámodhar Vithal* v. *Dámodhar Hari* (*g*) and *Tukárám* v. *Rámchandra* (*h*), in which it was held that a co-parcener in a Hindu family may, for valuable consideration, alienate, in his lifetime, his share in the undivided family estate to a stranger, were fully supported. A parcener cannot, however, dispose of his share in the undivided family estate by simple voluntary gift, or by devise, so as, after his decease, to bind his surviving co-parceners: *Gangubái* v. *Rámanná* (*i*), 2 Norton L. C. 355; 3 Bom. H. C. Rep. A. C. J. 9; 10 *Ibid.* 157; 2 Stra. H. L. 434 by Mr. Colebrooke.

It should be borne in mind that the purchaser at a judicial or private sale of the undivided share of a parcener in the family estate, or the mortgagee or other alienee (for valuable consideration) of such a share is not, before partition, entitled to insist upon the possession of any particular portion of the undivided family estate as representing the share of that parcener: *Appovier* v. *Rama Subba Aiyan* (*j*). A passage at page 380 in the judgment in *Kaliánbhái* v. *Motirám Jamnádás* (*k*) has been quoted, as showing that the law in this Presidency is otherwise; but the remark relied upon for that purpose was not indispensable to the decision of that case, and would appear to have been made with an imperfect recollection of the minor details of the cases of *Vásudev Bhat* v. *Venkatesh Sanbhán* and *Fakirápá* v. *Chanáppá* there mentioned. In the former of those cases, the Court upheld the attachment against three houses, but it did not say or suggest that upon a sale of Munjnáth Bhat's share in those houses taking place under that attachment, the purchaser could,

(*e*). 10 Bom. H. C. Rep. 139, 158, 159. (*f*). Ibid. 162.
(*g*). 1 Bom. H. C. Rep. 182. (*h*). 6 Bom. H. C. Rep. A. C. J. 247
(*i*). 3 Bom. H. C. Rep. A. C. J. 66. (*j*) 11 Moo. Ind. App. 75, 85, 90.
(*k*) 10 Bom. H. C. Rep 378, 380.

by any other means than by a partition, obtain possession of the share which he might, under such a sale, purchase. It should be further noted that there was nothing before the Court in that case to show that there was any family estate except those houses, and the argument throughout proceeded upon the broad questions whether a parcener might alienate, for valuable consideration, his share in undivided family estate, and whether such a share could be taken in execution for the separate debt of that parcener. In *Fakirápá* v. *Chanápá* the defendant was the purchaser of Baslingáppá's share in a house under a decree against the latter. It did not appear whether there was any family property beside the house, and the purchaser was not the plaintiff. The suit was brought by one of the co-parceners for a declaration of his right to the whole of the house, and he succeeded only in obtaining a declaration that he and the four other co-parceners beside Baslingáppá were entitled to five-sixths of the house, and that the purchaser, as alienee of Baslingáppá's share, was entitled to the remaining sixth. No question, therefore, arose in that case as to what would be the regular and proper manner for him to enforce his purchase. The sale (judicial or private), mortgage, or other alienation of a share in the undivided family property of a Hindu family, though in this Presidency conferring a right upon the mortgagee or purchaser, and working a severance so far as to render the mortgagee or purchaser a tenant in common with the parceners other than he whose share has been thus alienated, cannot be regularly and completely enforced by giving possession except through the medium of partition, which may be effected either amicably with the other parceners, or by a duly constituted suit for a partition of the whole of the family property, to which suit all of the co-parceners should be made parties: *Sadásiv* v. *Bápuji* (*l*), *Jiwan* v. *Gunnoo* (*m*), *Nánábhái* v. *Náthábái* (*n*), *Náráyan Bábáji* v. *Náná Manohar* (*o*); Manu, Ch. IX.

(*l*). 4 Morris S. D. A Rep. 145. (*m*). 9 Harr. S. D. A. Rep. 555.
(*n*). 7 Bom. H. C. Rep. 46. (*o*). Ibid. 178.

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pl. 47; *Trimbak Dixit* v. *Nárayan Dixit* (*p*). When a share in the undivided ancestral estate of a Hindu family is mortgaged or sold, either by the parcener himself, or by way of execution, the mortgagee or purchaser takes such share subject to such *prior* charges or incumbrances as may affect the family estate, or as may affect that particular share. If the mortgage or sale be of a special portion only of the family property, it may not always be possible, consistently with prior existing rights, for the Court, making the partition, to give possession of that portion to the mortgagee or purchaser. But generally it would be possible to do so, either wholly or partially, and, therefore, if without doing injustice either to prior incumbrancers or co-parceners, such possession can, on partition, be given, it would be the duty of the Court, making the partition, to endeavour to give effect to the mortgage or sale, and so to marshal the family property amongst the co-parceners as to allot that portion of the family estate, or so much thereof as may be just to the mortgagee or purchaser. Such was the view expressed, as we think correctly, in *Pándurang Anandráv* v. *Bháskar Sádashir* (*q*), decided 18th August 1874, and in which a review was refused on the 9th December 1874. Whether, in the event of it being impossible, consistently with justice to others, to give possession of the portion of the family property mortgaged or sold to the mortgagee or purchaser, he would be entitled to be recouped out of such other portion thereof as might, on partition, be allotted to the parcener whose share in the special portion had been mortgaged or sold, it is unnecessary now to give any opinion. The proper mode of attaching a parcener's share in the family property under an ordinary money decree would seem to be that the attachment should go against the share, right, title and interest of the judgment-debtor in such parts of the family property (naming and describing them) as the judgment-creditor can specify, and against his share, right, title, and interest in all other parts of the family property. It would be unreasonable to expect

(*p*). Supra, p. 69.

(*q*) Supra, p. 72 and *Note*, p. 75.

the judgment-creditor to be able to specify in detail the family property, but he should do so to the extent which his information would permit. The sale should be conducted on the same principle as the attachment, unless by arrangement with the co-parceners, which would often be advantageous to everybody concerned, the sale were confined to a particular portion of the family estate.

The District Judge further said: "It is also undoubted that the divided share of a Hindu would be liable to be sold after his death in execution of a decree obtained against his heir." In that proposition we fully agree. The divided share of a Hindu in property, which had previously belonged to the united family, is separate estate, and, like any other estate held in severalty (such, for instance, as self-acquired property), is assets, while yet in the hands of the heir, for payment of the debts of the deceased proprietor. We say "while yet in the hands of the heir," because it is not so hypothecated for the debts of the deceased that the heir may not, for valuable consideration, dispose of it effectually before attachment. The purchaser in such case would be protected, but the heir would, of course, be responsible for the purchase money: *Jamiyátrám* v. *Parbhudás* (*r*); 8 Harrington's S.D.A. Rep. 232, 289; and 10 Bom. H. C. Rep. 367.

The learned District Judge continued thus: "Udarám has as his son's heir, acquired his share in the family estate, but he has acquired it subject to its liabilities," and thereupon the learned Judge, assuming that the separate debt of Dhondu was one of those liabilities, made a decree in reversal of that of the Subordinate Judge, and in favour of the plaintiffs. In that decision we are unable to concur.

Subject to certain limited exceptions (as for instance debts contracted for immoral or illegal purpose), the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father or grandfather: 1 Dig. Bk. I. Chap. V., pl. CLXVII; *Girdhari-*

(*r*). 9 Bom. H. C. Rep. 116.

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*lall* v. *Kantoolall* (*s*). In the last mentioned case, alienations by the father in his lifetime, made for the purpose of raising money to pay his debts, were upheld. There, Sir Barnes Peacock, after referring to a case in 6 Moore's Ind. App. 421, says :—"That is an authority to show that ancestral property, which descends to a father under the Mitakshara Law, is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce :—'The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt'." In the mofussil of this Presidency, previously to Mr. White's Act (Bombay Act VII. of 1866) the sons and grandsons of a deceased Hindu were personally liable for his debts whether they received assets from him or not : Vyav. Mayukha, Chap. V., Sec. IV., pl. 11, 12, 13, and 14 ; 1 Dig. Bk. I., Ch. V., pl. CLXXXVIII. ; the responses of the Pandits 2 Borr. p. 222, 2nd Edn. ; 1 Stra H. L. 167. There is not any authority for the converse of that proposition, viz., that the father or grandfather is responsible for the debts of the son or grandson independently of the receipt of assets. Kátyáyana says :—"By the general rule of law, a father need not pay the debt of the son ; but he must pay it, if either at the time of the loan, or afterwards, he promised payment": 1 Dig. Bk. I, Ch. V., pl. CCXV. There has not been any such promise proved here. The proposition which we find in the books of Hindu law, that debts follow the assets into whosesoever hands they come, must, generally speaking, be confined to separate estate. There is special mention made of the circumstances under which the joint family estate or the co-parceners of the debtor are responsible

(*s*) L. Rep. 1 In. App. 321

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for his debts. For instance, Manu says:—"If the debtor be dead, and if the money borrowed was expended for the use of the family, it must be paid by that family, divided or undivided, out of their own estate:" 1 Dig. Bk. I., Ch. V., pl. CLXXXVI. Vrihaspati lays it down that: "A house-keeper (*Grihasta*, householder,) shall discharge a debt contracted by his uncle, brother, son, wife, servants, pupil or dependants for the support of the family during his absence" (*Ibid.* pl. CLXXXIX). To the same effect are several other passages in Jagannátha's Digest (*Ibid.* pl. CXC. to pl. CXCIII. inclusive; pl. CXCVI. to pl. CC. inclusive). The liability of undivided ancestral estate, in the hands of the sons and grandsons, to the debts of the father or grandfather is also exceptional, and is provided for by special texts, to some of which we have already referred. That it is exceptional is clearly deducible from the following text of Nárada (1 Dig. Bk. I., Ch. V., pl. CLXIX) :—"A father being dead, his sons, whether after partition or before it, shall discharge his debt in proportion to their shares, or that son alone who has taken the burden upon himself." The words "after partition or before it," and the word "shares" here show that the author was treating of ancestral property, and that he felt it necessary expressly to declare its liability to the debts of the father, whether or not it was undivided, *i.e.*, after partition or before it. And Yájnyavalkya (*Ibid.*, pl. CCXXIX) says:—"A debt, secured merely by a written contract, shall be discharged, from a moral and religious obligation, only by three persons, the debtor, his son, and his son's son; but a pledge shall be enjoyed until actual payment of the debt by any heir in any degree." That, generally speaking, undivided family property is not, in the hands of surviving co-parceners, liable to the separate debt of a deceased co-parcener, *i.e.*, a debt not incurred on behalf of the family, was decided in *Goor Pershád* v. *Shrodin* (*t*), a much stronger case, so far as the creditor was concerned, than the present case. The parcener's share in a house, which was undivided family

(*t*) 4 N. W. Prov. Rep. 137.

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property, was attached, in his lifetime, under a decree obtained against him for his separate bond debt. He died before any sale under the attachment. The High Court of the North-Western Provinces affirmed the ruling of the Courts below, which discharged the attachment on the ground that Mahádev at his death "left no right at all in the house, and that there was nothing, therefore, in connexion with it which was liable to be sold" for the purpose of satisfying the plaintiffs' decree. To that extent we fully concur in that decision; but there were remarks made by the Court in that case as to the inalienability of a share in undivided estate, which would not be applicable in this Presidency. In the present case, neither the decree sought to be executed against the family property, nor the attachment was made in the lifetime of Dhondu. His share had ceased before either of those events. It is not proved that any separate estate of the son has devolved upon the father. The shop, upon which the plaintiffs seek to fasten their claim, has throughout been in the possession of the father; and although the son was jointly interested in it, it is not pretended that the son ever even demanded, much less obtained, a partition of it. The right of the son to a share in it, as being ancestral property, had come into existence at his birth, and it died with him. The plaintiffs, therefore, cannot render it available for their claim.

We reverse the decree of the District Judge and restore that of the Subordinate Judge. The respondents must pay the costs of the suit and of both appeals.

[ECCLESIASTICAL JURISDICTION.]

*In the Goods of Nánábhái Sorábji Mestri, deceased.* 1874. January 9.

AVA'BA'I ... ... ... ... ...*Applicant*
PESTANJI NA'NA'BHA'I ... ... ...*Caveator.*

*Will—Signature for testator by another—Attestation—Indian Succession Act X. of 1865, Sec. 50—English Wills Act, 1 Vic., C. 26, Sec. 9.*

The person making the signature of a will for the testator, is not competent as an attesting witness of its execution under the provisions of the Indian Succession Act.

*In the Goods of Bailey*, 1 Curt. 914, and *Smith* v. *Harris*, 1 Rob. 262, distinguished.

*Badrudin Tyabji*, for the caveator, on 6th September 1873, obtained a *rule nisi* calling upon the applicant to show cause why the issue of letters of administration ordered to be issued should not be stayed, on the ground of the existence of a properly executed will of the deceased.

The rule came on for argument before MARRIOTT, J., on the 13th December 1873, when *Mayhew*, for the applicant, showed cause.

*Badrudin Tyabji*, for the caveator, supported the rule.

On the 9th January 1874 the following judgment was delivered by

MARRIOTT, J. :—The alleged will of the deceased is dated the 16th of July 1868, and the deceased did not sign or affix his mark thereto; but it was alleged to have been signed for him by one Shápurji Sorábji, and the signature and attestation, as translated, were in the following words: "Nánábhái Sorábji, his signature (the testator), having been got to hold the pen, (his) signature was made. The handwriting of Shápurji.

"I Sorábji Hormji Shroff (his) attestation."

It was argued by Mr. Mayhew that Shápurji Sorábji, the person who signed the will for the testator, was not

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competent to be also an attesting witness, under the provisions of Section 50 of the Indian Succession Act, and that, therefore (assuming Shápurji's signature to have been made in the character of an attesting witness), the will was not attested by two witnesses as required by that section.

The first sub-division of Section 50 provides that "the testator shall sign or affix his mark to the will, or it shall be signed by some other person in his presence and by his direction;" and the third sub-division of the same section, omitting the words applicable to the case of a will signed by the testator himself, runs thus :—"The will shall be attested by two or more witnesses, each of whom must * * * have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement * * * of the signature of such other person, and each of the witnesses must sign the will in the presence of the testator; but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

The words "some other person," upon the construction of which the question turns, would appear, in their natural and ordinary sense (in which sense they must be construed), to mean not only some person "other" than the testator, but also some person "other than" the attesting witnesses. Mr. Badrudin Tyabji, however, (who appeared in support of the rule), contended that the words "some other person" mean some person other than the testator, but not other than the attesting witnesses. That construction, however, in my opinion, is incorrect. Because, if any one of the attesting witnesses made the signature himself, it is clear that he could not have seen it made by "some other person"; and inasmuch as the section requires that *each* attesting witness should have seen the signature made by "some other person," it necessarily follows that the words "some other person" must mean some person other than any of the attesting witnesses.

The words "such other person" in the subsequent part of the third sub-division of the section directly refer to the preceding words "some other person," and must also, therefore, mean some person other than the attesting witnesses.

I think, therefore, that the person making the signature to the will is not competent as an attesting witness, and that this alleged will has not been duly attested, according to the provisions of Section 50 of the Indian Succession Act.

In the course of the argument, I was referred to two cases, *In the Goods of Bailey* (*a*), and *Smith* v. *Harris* (*b*), in which it was held under the English Wills Act (1 Vic., C. 26, Sec. 9), that the person signing the will for the testator was competent to be an attesting witness. In my opinion, those cases do not apply. They turned upon the language of the English Act, and that language is materially different from that of the Indian Succession Act, and there is nothing in the English Act, indicating in express terms (as I consider there is in the Succession Act), the intention of the Legislature, that the person making the signature should not be one of the attesting witnesses.

As I have arrived at the above conclusion, it is unnecessary for me to consider the other points made by Mr. Mayhew.

I discharge the rule. Each party to pay their own costs.

*Rule discharged.*

(*a*) 1 Curt. 914. (*b*) 1 Rob. 262.

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[APPELLATE CRIMINAL JURISDICTION.]

## REG. *v.* PARBHUDA'S AMBARA'M and others.

*Indian Evidence Act I. of* 1872, *Secs* 11, 14, 43, 54, *and* 153—*Forgery—Inadmissible evidence.*

Section 11 of the Indian Evidence Act should not be construed in its widest signification, but considered as limited in its effect by Section 54 of the Act. So construed, Section 11 renders inadmissible the evidence of one crime (not reduced to legal certainty by a conviction) to prove the existence of another unconnected crime, even though it be cognate. Accordingly, the possession by an accused person of a number of documents suspected to be forged is no evidence to prove that he has forged the particular document, with the forgery of which he is charged.

PER WEST, J. :—Where a person charges another with having forged a promissory note, and denies having ever executed any promissory note at all, the evidence that a note, similar to the one alleged to be forged, was, in fact, executed by that person, is not admissible, nor even would a judgment, founded upon such note, be so : Sections 43 and 153 of the Indian Evidence Act.

THE accused No. 1, Parbhudás, was charged with having forged a promissory note, purporting to have been passed to him by one Fakirchand, and the other four accused with having abetted this offence. The trial was conducted by W. H. Newnham, Session Judge of Ahmedabad, who sentenced each of the accused to seven years' rigorous imprisonment.

It appeared on the evidence that a bundle of papers was found in the possession of four of the accused persons. Some of them were blank stamp papers, purchased in the names of different persons, others were deeds, purporting to have been signed by the obligor, but bearing no attestations ; others, again, bore the signatures of supposed obligors to blank deeds. In convicting the prisoners, the Session Judge, with regard to these papers, made the following observation :—

"The fact, therefore, of papers being found in the houses of four of the accused of such a description as to throw the gravest suspicion on their dealings in bonds, remains totally unexplained ; and though it does not, of course, prove the bond now in question to be a forgery, it must needs

materially affect the Court's opinion of the evidence in the present case."

The appeal was heard by MELVILL and WEST, JJ.

*Macpherson* and *Leith* (with them *Shántárám Náráyan* and *Chandulál Mathurádás*) for the appellants.

*Mayhew*, Legal Remembrancer (with him *Dhirajlál Mathurádás*, Government Pleader,) for the Crown.

WEST, J.:—On consideration, I am of opinion that the bundles of documents found in the houses of four of the accused, and alleged to be forgeries, or inchoate forgeries, were improperly admitted as evidence in this case. Section 11 of the Evidence Act is, no doubt, expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into connexion with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connexions of human affairs are so infinitely various and so far reaching, that thus to take the section in its widest admissible sense, would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of the parties. One of the objects of a law of evidence is to restrict the investigations made by Courts within the bounds prescribed by general convenience, and this object would be completely frustrated by the admission, on all occasions, of every circumstance on either side having some remote and conjectural probative force, the precise amount of which might itself be ascertainable only by a long trial and a determination of fresh collateral issues, growing up in endless succession, as the inquiry proceeded. That such an extensive meaning was not in the mind of the Legislature, seems to be shown by several indications in the Act itself. The illustrations to Section 11 do not go beyond familiar cases in the English Law of Evidence. The possession by an accused of several other articles deposed to have been stolen, would, no doubt, have some probative force on the issue of whether he had received the particular articles which he was charged

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with having dishonestly received, and the receipt or possession of which he denied altogether, yet, in the first illustration to Section 14, it is set forth as a preliminary to the admission of testimony as to the other articles that "It is proved that he was in possession of [the] particular stolen article." The receipt and possession are not allowed to be proved by other apparently similar instances, only the guilty knowledge which can be inferred satisfactorily through a conscious or unconscious application of the law of probabilities from a multiplication of the fractions representing in each case the ratio of probable ignorance to probable knowledge of how the goods had been come by. Illustration (O) to the same section makes a previous attempt by the accused to shoot the person murdered, evidence of the accused's intention, but not of the act that caused the death; yet it is certain that on the issue of whether *A* actually shot *B* or not, the fact that he had previously shot at him, would have some probative force; so, too, would proof of a general malignity of disposition by evidence "that *A* was in the habit of shooting at people, with intent to murder them," yet this evidence is excluded even as proof of *A*'s intention, either as too remotely connected with the particular intention in issue, or as raising collateral questions, which could not properly be resolved in the case. What, however, is to my mind most conclusive, is Section 54. That a man has a notoriously bad character, may very often, when taken "in connexion with other facts * * * make the existence * * * of a fact in issue * * * highly probable or improbable," yet this is declared irrelevant, except when evidence of good character has been given. But, again, if the bad character has been reduced to legal certainty by a conviction, evidence of the conviction is admissible. The conviction admits practically of no dispute, but evidence, merely tending to establish another offence, may, and generally will, be met by counter-evidence, raising unmanageable collateral questions. It may be remarked, too, that the case of a previous conviction being one covered and exceeded by the terms of Section 11 in their widest extension, its subsequent specification shows that the Legislature

did not intend those terms to be thus taken, and that the provision for admitting evidence of a previous conviction amounts, as an exact indication of how far in this direction the Legislature meant to go, to an implied exclusion of matters having a remoter and more disputable bearing on the issues under trial, such as the particular facts on which the previous conviction was founded. And if this reasoning applies to such matters, it must apply *a fortiori* to those which are evidence not of a crime actually proved, but only of one suspected. The extent of the earlier enactment in this direction is restricted by the more specific provision for the later one.

In the English law, rules, substantially identical with those embodied in Section 14 and its illustrations, have not been thought inconsistent with others corresponding to the construction which, I think, ought to be put upon Section 11 of the Indian Evidence Act. "In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule that the evidence is to be confined to the point in issue; for, where a prisoner is charged with an offence, it is of the utmost importance to him that the facts, laid before the Jury, should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer": 3 Russell on Crimes, 279. "Hence, where * * * the evidence appears to refer to more than one distinct unconnected felony, it is usual for the Judge in his discretion to call upon the counsel for the prosecution to select one felony, and to confine the evidence to that particular charge. Thus on an indictment * * * for receiving several articles, if it appear that they were received at different times, the prosecutor may be put to his election" (*Ibid.* 280) although (page 28) "evidence may be given of all the receipts for the purpose of proving guilty knowledge." This is the rule of Section 14, standing side by side with the rule of Section 11 as I construe the latter, and when several offences are so connected that proof of one can be arrived at through evidence going to prove the others, the evidence is not on

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that account excluded. In *Rex* v. *Ellis* (*a*) it is said: "Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony, but where several felonies are connected together and form part of one entire transaction, the one is evidence to show the character of the other." In *Rex* v. *Crocker* (*b*) a charge of forging one promissory note was supported by evidence that another one found in the prisoner's pocket-book was forged. The evidence was admitted by the Judge at the assizes, but the prisoner was afterwards released on a case submitted to the twelve Judges, and it was understood that they thought the evidence inadmissible: 2 Russell on Crimes, 816, 838. Thus, if a fact has a direct probative force, it is not excluded by the English rule; but if its force is merely mediate through its tendency to prove another cognate offence, it is excluded. I do not think the rule in the Indian Evidence Act was intended to go beyond this. There must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmative or negative of a proposition "highly probable," and with any reasonable use of this discretion, the Court ought not to interfere, but it appears to me to be as illegal now, as before the Evidence Act was passed, to admit evidence of crime *A* in order to prove the cognate but unconnected crime *B*.

The documents in the present case seem to afford some *primâ facie* evidence of about one hundred and fifty offences besides the one charged against the accused. But without a trial the case on any one of those documents cannot be more than one of suspicion. The law says that a conviction shall be evidence, but it does not say that suspicion, however strong, of another offence, shall be evidence, or that facts tending to create such a suspicion shall, in virtue of that tendency, be evidence. The present case is one in which the rule of exclusion is severely tried, because the improbability, that the accused should have committed forgery in

(*a*) 6 Barn & Cress 145. (*b*) 2 Leach 987.

the particular instance under trial, is really diminished very perceptibly by their possession of so many documents seemingly prepared for fraudulent use; but still it is not, I think, on that account to be broken down. The general mischief would far outweigh the particular advantage; and the tendency to stray from the issues is so strong in this country, that any indulgence of it beyond the clear provisions of the law is certain to lead to future embarrassment. I think, therefore, that the documents—even those as to which some evidence has been given, and *â fortiori* the others—must be excluded from consideration.

Equally inadmissible, on the other hand, was the evidence on the part of the prisoners, by which it was sought to disprove the complainant Fakirchand's assertion that he had never made a promissory note. That the prisoner, Mansuklál, had filed a suit against Fakirchand on a promissory note, which suit he afterwards withdrew without the defendants appearing to answer, could be no proof of the alleged transaction for the purposes of the trial. What Mansuklál said on the occasion could be no evidence in his favour. The *ex-parte* deposition in the civil court of the court's peon that he had served Fakirchand with the summons, would be no evidence of a real service for this case. It was only if the alleged promissory note should be held proved, and proved as made at Ahmedabad, that it could prove Fakirchand to have been at Ahmedabad on the date it bore; and its genuineness was a collateral issue which the Court could not try, though it could receive the evidence of witnesses directly deposing that they saw Fakirchand at Ahmedabad on the day it was made. The hearsay evidence of a compromise, carried out by Fakirchand, was in any case inadmissible, and no one deposes to having himself seen him pay the amount of the compromise to Mansuklál. Upon the whole, the direct evidence of Mansuklál's acts in connexion with his claim on the promissory note to himself, is calculated to create an impression by no means favourable to that prisoner, but if the supposition be adopted, which is most favourable to the admission of Fakirchand's own examination on this

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matter, namely, that it was intended to shake his credit, then Fakirchand having denied that he had ever made a promissory note such as the one to Mansuklál, and the fact of whether he had or not being relevant to the present trial only in so far as it might affect Fakirchand's credit, no contradiction of his statement could, according to the principle of Section 153 of the Evidence Act, in strictness, be received. But the whole inquiry into the collateral question of the genuineness of Mansuklál's note was, in my view, irregular, and ought to be excluded from consideration. Even a judgment obtained by him on the note would, according to Section 43, have been inadmissible, unless that section is construed as widely as it is proposed to construe Section 11.

It is not very easy to say, when the necessary deductions have been made, to what conclusion the remainder of the evidence ought to have led the Court of Sessions. But first the balance of testimony seems to be decidedly in favour of the firm, of which Fakirchand is a member, being in good repute and possessed of means for its business. The allegation that Fakirchand was engaged in clandestine "Satta" transactions, is an unlikely one in the case of a mere child, as he was at the time, and is supported by no evidence of any one with whom he dealt. The books of the prisoner Parbhudás, which were seized suddenly, present no entry of the alleged loan, though those of his witness Jaichand, produced voluntarily some months afterwards, do contain an entry of his share of the loan. The excuse made that the money, advanced by Parbhudás, belonged to his mother, is very unsatisfactory. It is very unlikely that a note, payable by monthly instalments, and in which several people of small means were interested, should be allowed to stand for four or five years without a payment on account. When Mansuklál had sued, and been forced into a compromise, Parbhudás would naturally take immediate steps to enforce the settlement of his undeniable claim, and would not wait inactive for more than a year. The evidence for the prosecution, if it is to be believed, proves conclusively that Fakirchand was not at Ahmedabad at the time when the note purports to have

been made by him there. An *alibi* is generally an unsatisfactory way of disproving a claim or charge, but now it is supported by a considerable preponderance of the other testimony in the case. The conviction cannot be reversed if, "independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision" (Indian Evidence Act, Sec. 167). Here no objection appears to have been taken in the Court of Session, but the Session Judge ought, I think, to have excluded some of the evidence admitted by him in the exercise of his discretion, under Section 256 of the Code of Criminal Procedure; yet, on the whole, enough remains to support Fakirchand's denial of the note, and therefore to justify the decision of the Court of Session, which should, therefore, I think, be affirmed.

MELVILL, J. :—I have also arrived (though not without reluctance) at the conclusion that the Sessions Court ought not to have admitted evidence, that a number of documents, apparently forged, or held in readiness for the purpose of forgery, were found in the prisoners' possession. The point has been decided in England in *Griffits* v. *Payne* (c), in which case the defence was that the defendant's acceptance on the bill was a forgery, and evidence that a collection of bills, on which the defendant's acceptance was forged, had been found in the plaintiff's possession, was offered and refused, LORD DENMAN observing that such evidence would be clearly inadmissible in an indictment for forgery. It appears to me that the Indian Evidence Act does not go beyond the English law in regard to the admission of such evidence, except in so far as it renders a previous conviction relevant.

The learned Legal Remembrancer has argued that the evidence is relevant on the same ground that evidence of the discovery of implements of house-breaking in a prisoner's house is admitted in an indictment for house-breaking. But that evidence is admitted not to prove the fact of the house-breaking, but to show that the prisoner is the person who

(c) 11 A. and E. 131.

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has committed an act of house-breaking, the fact of which has been proved *aliunde*. In the present case it is attempted to use the possession of the implements of forgery as evidence that a forgery has been committed.

But excluding the evidence thus improperly admitted, I am of opinion that there remains sufficient to sustain the conviction. The greater part of the evidence for the prosecution has been believed by the Sessions Judge and the assessors; and I do not think that, as a court of appeal, we should be justified in dissenting from the view taken by them, merely because evidence of the same description is frequently manufactured. I have no hesitation in expressing my opinion that the evidence of the complainant having executed a bond to prisoner No. 3, by which it has been attempted to rebut the evidence for the prosecution, is, even if it be admissible, wholly unreliable.

I concur in confirming the conviction and sentence.

*Conviction and Sentence confirmed.*

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[APPELLATE CRIMINAL JURISDICTION.]

Feby. 11.

## REG. *v.* GULA'BDA'S KUBERDA'S.

*Session Case—Criminal Procedure Code, Secs.* 4, 296, *and* 473—*Jurisdiction—Giving false evidence in a judicial proceeding—Contempt of Court—Session Court—Assistant Session Judge.*

To make a case a "session case" within the meaning of Section 4 of the Code of Criminal Procedure, it is not necessary that it should be triable exclusively by the Court of Session.

For the purposes of Section 473 of the Code, an Assistant Session Judge is a different Court from the Session Judge. Accordingly, an offence, which is committed in contempt of the Session Judge's authority, is cognizable by an Assistant Session Judge.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction. The accused Gulábdás was tried, and convicted by J. W. Walker, Assistant

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Session Judge of Ahmedabad, of the offence of giving false evidence in a judicial proceeding, and sentenced to three years' rigorous imprisonment. He made an appeal to W. H. Newnham, the Session Judge, which was rejected.

The accused, Gulábdás, was charged with having given false evidence in the case of Reg. *v.* Govind Narsi, tried by Mr. Melvill in September 1873. This charge was at first inquired into and dismissed, but the accused was subsequently directed to be committed by the Session Judge.

The application to the High Court was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

*Leith* (with him *Shántárám Náráyán*) :—The commitment of the accused is illegal in this case, as it is not a "session case." Section 4 of the Code of Criminal Procedure defines this phrase by saying that it means and includes all cases specified in column 7 of the fourth schedule to this Act, as cases triable by a Court of Session and all cases which Magistrates commit to a Court of Session, although they might have tried them themselves." The former part of this definition is intended to meet cases exclusively triable by the Court of Session and the latter part to cases which the Magistrates themselves commit of their own accord without any order from the Court of Session. *In re Haran Mandal* (*a*). [WEST, J. :—Another objection may be suggested to the trial of the case. The offence of giving false evidence is a contempt of court, and was committed before the Court of Session. Can the Assistant Session Judge, who is only a branch of that Court, try it ?] This is a question of jurisdiction, and I take the objection. Section 15 of the Procedure Code provides only one Court of Session for every sessions division.

*Dhirajlál Mathurádás*, Government Pleader, for the Crown :—Wherever the Legislature intended that a case should be triable by a Court of Session exclusively, they have expressly made use of that word, as, for instance, in Section 347. The power to order commitment was given to that Court

(*a*) 2 Beng. L. Rep. I A. Cr. J.

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by Section 435 of the old Code; and the new one does not take it away. With regard to the second objection, the Assistant Judge should be regarded as a separate Court from the Session Judge; for, otherwise, a man guilty of a grave misstatement before a Session Court must be sent for trial to a Magistrate who cannot award more than two years' imprisonment, while if he makes a misstatement, however unimportant, before a Magistrate, he renders himself liable to a sentence of seven years.

*Leith* in reply.

WEST, J. (in delivering the judgment of the Court said) :— On consideration, we have arrived at the conclusion that this is a "session case." Section 435 of the Code of Criminal Procedure of 1861 as amended by Act VIII. of 1869 gave power to the Court of Session to order the commitment of an accused person discharged by the Magistrate in case of an offence triable exclusively by that Court or by that Court and the District Magistrate; and there is nothing in the present Code of Procedure to indicate an intention to limit the authority of the Court of Session within narrower bounds. The latter part of Section 296 provides "that in session cases, if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed or that an accused person has been improperly discharged by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial." The true construction of this, we think, is that a Court of Session may direct commitment in any case specified in Schedule IV. to the Code as triable by that Court, although there may also be a specification of the offence as triable by a Magistrate. In order that a case may be a session case within the meaning of Section 4 of the Code, it is not necessary that it should be triable exclusively by a Court of Session.

Considering this case, therefore, to be a session case, we must hold that the Court of Session, no doubt, had power to order the committal of it under Section 296.

The next question is a more difficult one. It is whether the offence of giving false evidence having been committed

by the accused in contempt of the authority of the Court of Session, the Assistant Session Judge, who is only a branch of that Court, has jurisdiction to try it. Section 473 of the Criminal Procedure Code says that, with certain exceptions, no Court shall try any person for an offence committed in contempt of its own authority. The intention of the Legislature in this language may be the more easily perhaps gathered if we consider the definition of the phrase "Criminal Court" in Section 4. It is there enacted that "'Criminal Court' means and includes every Judge or Magistrate, or body of Judges or Magistrates inquiring into, or trying any criminal case, or engaged in any judicial proceeding." This definition is a personal one; a change of the Judge involves a change of the Court. Reading Section 473 by the light of Section 4 thus construed, we think the intention of the Legislature was to ensure that no Judge, who had formed any (even a provisional) opinion upon a case, should be the one to try it. The Assistant Judge is thus, for the purposes of Section 473, and according to the view of the Legislature, a different Court. This construction is not inconsistent with Sections 17 or 18 of the Code which provide for the appointment of Joint and Assistant Session Judges. In one sense, no doubt, the Session Judge, the Joint Judge, and the Assistant Judge may be regarded as one Court of Session; but for the purposes of Section 473, we hold them to be separate. This construction, where it applies, removes the anomaly that a person who makes an unimportant false statement before an inferior tribunal is liable to be imprisoned for seven years on trial by a Court of Session, whereas one who falsely makes a grave misstatement before a Court of Session must be sent to a Magistrate and cannot be punished with more than two years' imprisonment.

We must, therefore, reject the petition of the accused Gulábdás.

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[APPELLATE CRIMINAL JURISDICTION.]

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## *In re* NA'RA'YAN M. PENDSHE'.

*Right of Counsel to conduct prosecution—Crim. Proc. Code, Secs.* 59, 60, 235, 251, *and* 252—*High Court Rule No.* 7, *Ch. XI., at page* 71 *of the Rule Book.*

Whether or not a private complainant is permitted, under Section 59 of the Code of Criminal Procedure, to conduct a case as prosecutor, he may instruct counsel who shall be entitled to appear, under No. 7, Chap. XI. of the High Court Rules, and the Public Prosecutor may, thereupon, avail himself of the counsel's services under Section 60.

The effect of Section 235 of the Code, read with Sections 59 and 60, is to make every case tried by the Court of Session a case falling within the provisions of Section 60, that is to say, the Public Prosecutor may always avail himself of the services of counsel retained by a private individual, and in so doing he does not deprive himself of the management of the case.

Where the assistance of counsel has once been accepted, that assistance is not excluded at the stages of the trial (summing-up by the Prosecutor and his reply) to which Sections 251 and 252 apply.

THIS was an application by a complainant in a criminal trial pending before De H. Larpent, Session Judge of Puná.

The applicant charged one Náráyan Jagannáth Bhidé with having made a false statement in a judicial proceeding, and instructed Mr. Leith, Barrister-at-Law, to conduct the case on his behalf. The Session Judge, under the circumstances alluded to in the following judgment, having declined to hear counsel who was not authorized by the Magistrate of the District, an application was made to the High Court.

It was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

*Leith* (with him *Ghanashám Nilkanth*) appeared for the petitioner.

The judgment of the Court was delivered by

WEST., J.:—It appears to us that Section 59 of the Code of Criminal Procedure is intended to lay down a general rule applicable to all those cases in which more specific rules are not provided. Section 60 applies to the case when a Public Prosecutor has been retained. Under that section, if a private person instructs counsel or pleader, he can only appear subject to

the specific provisions which reserve to the Public Prosecutor the management of the case, and prescribe that the counsel or pleader is to act under his directions. Whether a private complainant is permitted or not, under Section 59, to conduct the prosecution, he may instruct counsel through a pleader under the High Court Rule, Chapter XI., Section 7, at page 71 of the Rule Book; and thereupon the Public Prosecutor may avail himself of the counsel's services under Section 60.

Section 235 provides that in every trial before a Court of Session the prosecution shall be conducted by the Public Prosecutor, Government Pleader, or by some officer specially empowered by the Magistrate of the District. The effect of this enactment is to make every case tried by the Court of Session a case falling within the provisions of Section 60. The Public Prosecutor may avail himself of the assistance of counsel retained by a private individual. In so availing himself of the counsel's services, the Public Prosecutor by no means deprives himself of the management of the case. The two together may work in harmony; if they do not, the counsel may retire, or the Prosecutor may claim to keep the further conduct of the case solely to himself.

A verbal difficulty arises from the wording of Section 251. "The Prosecutor," it is there directed, is to sum up his case. And in the next section, "the officer conducting the prosecution is entitled to a reply." In neither of these sections, however, we think, is the assistance of counsel meant to be excluded. Where the assistance of counsel has once been accepted that assistance is not excluded at the important stages of the trial to which Sections 251 and 252 apply.

In the case before us, there appears to have been some misapprehension on the part of the Session Judge in regard to the proper scope of Section 235. If the Session Judge means that the Public Prosecutor could not delegate *in toto* the management of the case to the complainant's counsel, he would be correct; but if he means that the former could not even delegate the powers of conducting the prosecution to the latter to any extent, he would be wrong. The law

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allows such delegation. The Public Prosecutor may properly delegate the conduct of the case so far as to take the aid of an advocate exercising his proper function; provided he retains general management to himself.

There seems to have been another misapprehension on the part of the Session Judge caused by the Public Prosecutor. He says in the early part of his report that the Public Prosecutor said he did not instruct Mr. Leith. In the postscript he says that the Public Prosecutor informed him that in signing Mr. Leith's brief he considered that he was handing over to him the prosecution of the case. It is to be regretted that this misapprehension was not cleared up at an earlier stage, for it is in consequence of that he refused to hear the counsel. Section 59 has no decisive bearing on the matter. It was competent to the complainant to engage Mr. Leith as counsel, and for the Public Prosecutor to avail himself of his services.

We direct that Mr. Leith, or any other counsel or pleader for the complainant, be allowed to appear and examine the prosecutor's witnesses-in-chief, or re-examine them, and also to cross-examine the witnesses for the defence.

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[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No.* 349 *of* 1873.

June 9. IMA'M SA'HEB and others ..... *Appellants.*

KA'SIM SA'HEB..... *Respondent.*

*Muhammadan Law—Suit by a legal sharer—Suit by residuaries.*

A suit by a Muhammadan widow (legal sharer) against her sons (residuaries) for her share of the property left by her deceased husband, is no bar to a suit being brought by some of the sons against the others for their shares.

THIS was a special appeal from the decision of N. Daniell, Acting Judge of the district of North Kanara, reversing the decree of the Subordinate Judge of Karwar.

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One Shekh Sáheb died, leaving a widow, four sons, the present litigants, and three daughters. Kásim Sáheb, who was in possession of his property, was sued first by the daughters, some of whom obtained a decree and recovered their share. He was next sued by his mother, and while the suit was pending, his three brothers brought the present suit for their shares. The Subordinate Judge awarded the principal part of the claim, but the District Judge rejected it *in toto*, on the ground that the sons could not divide, or even put forward any existing right to parental property as residuaries, until the claim of the mother, a legal sharer, was first satisfied.

The special appeal was heard by WEST and LARPENT, JJ.

*Shámráv Vithal* for the appellants:—The distinction between sharers and residuaries has no reference whatever to the time of bringing a suit. It is not necessary that the suit of the latter should be postponed till the claims of the former are satisfied. The distinction has reference only to his proportions which each class is entitled to receive: Macn., para 8.

*Dhirajlál Mathurádás*, Government Pleader, for the respondent.

PER CURIAM:—The District Judge has found in this case that no cause of action had accrued to the plaintiffs (brothers of the defendant), because the widow of their father had filed a suit, against the plaintiffs and defendant both, for her share of her husband's property. The plaintiffs sued on an agreement of partition, but whether they based their claim on this or on their mere right of inheritance, the fact that their father's widow had instituted a suit for her share could not be a good reason for excluding them from enjoyment of their shares of the common property. If it were a reason, then by prolonging the litigation with his father's widow, the defendant might keep the plaintiffs out of their shares for an indefinite period. For any claim that may be established by the widow, they will be answerable in common with the defendant. Subject to that, they are entitled to a proportional enjoyment. The defendant, by keeping them out of

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it, has done them a wrong (assuming that they can prove what they affirm), and this wrong constitutes a cause of action. We, therefore, reverse the District Judge's decree, and remand the cause for retrial and a new decree. In such retrial, it will be expedient, if possible, that advertence should be had to the rights which the widow may meanwhile have established in her suit against the parties to this cause, or that the requisite steps should be taken for enabling the Court to pronounce at the same time upon the conflicting claims of the several parties, setting up an interest in the property to be administered. Costs to follow the final decision.

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[APPELLATE CIVIL JURISDICTION.]

June 15.

*Special Appeal No.* 515 *of* 1873.

KRISHNARA'V RA'MCHANDRA and another...*Appellants.*

MA'NA'JI BIN SAYA'JI and another.....*Respondents.*

*Jurisdiction—Small Cause Court—Act XI. of* 1865, *Sec.* 6, *Exception* 4—*Special Appeal—Suit for arrears of rent—Regulation XVII. of* 1827, *Section* 31, *Clause* 3—*Payment by a lessee to one of several joint lessors—Pleading.*

The expression "or former year" in Regulation XVII. of 1827, Section 31, Clause 3, does not mean the year immediately preceding the current year, but any previous year, and a suit for rent could have been brought before a Revenue Officer, when Act XI. of 1865 was passed, and not before the Small Cause Courts constituted by that Act. A special appeal lay in a suit of this nature.

Payment of rent by the lessee to one of several joint lessors, and at his request, discharges the debt as to all; as also payment made at his request to one of several joint creditors. Where one of several joint-creditors, who has no rights separate from those of the others, refuses to join in the suit as plaintiff, and there is no averment of collusion on his part with the defendant, he cannot rightly be joined as a defendant.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Satara, affirming the decree of the First Class Subordinate Judge, Krishnaráv Vithal Vinchurkar.

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This suit was brought by Krishnaráv Rámchandra and his brother Vináyak, to recover the rent of some *kuran*-land (grass-land) for the year 1868-69. The suit was based on a *kabuláyat* (rent-note) which the defendant Mánáji had passed, jointly, to the two plaintiffs and Sakhárám Khanderáv (defendant No. 2), under date the 18th June 1868. The plaint was filed on the 3rd April 1871, and stated that the whole rent was Rs. 40, of which the plaintiffs claimed two-thirds on account of their two shares, and that as Sakhárám refused to join as co-plaintiff, the plaintiffs made him a co-defendant. But no relief was asked by the plaintiffs as against Sakhárám. Mánáji answered that nothing was due to the plaintiffs on account of rent, as he had already paid it off, viz., Rs. 25-10, to Government on account of the *charthái* tax, at the request of Sakhárám (defendant No. 2), and the balance to Sakhárám himself. Sakhárám, in his defence, admitted the payments which Mánáji alleged he had made. Both the lower courts, viz., the Subordinate Judge's Court and the District Court of Satara, held as proved the payments alleged to have been made by Mánáji, and threw out the plaintiffs' claim as unsustainable against the defendant Mánáji. The plaintiffs preferred a special appeal, which came on for hearing on the 9th June 1874, before WEST and LARPENT, JJ., when

*Vishnu Ghanashám*, on behalf of the respondents Mánáji and Sakhárám, took a preliminary objection that, under Act XXIII. of 1861, Section 27, no special appeal lay in the case, as it was a Small Cause Court suit. The action was one for rent, cognisable by a Court of Small Causes, under Act XI. of 1865, Section 6, unless it came within Exception 4 to that section. The suits for rent, excluded from the jurisdiction of Small Cause Courts, were those which might be brought before a Revenue Officer, as provided in Exception 4 to Section 6 of that Act. Now, the only suits or rent, cognisable by a Revenue Court, were suits for the current or former year, under Regulation XVII. of 1827, Section 31. The present suit, having been filed on the 3rd April 1871, and seeking to recover rent due for 1868-69,

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was not, and could not be said to be, a suit for rent either of the current or the former year. [WEST, J. :—" Former year " does not mean immediately preceding year, as appears clear from Section 27 of the Regulation, where the expression " former years" is used.] The words "former year " in Section 31, used as they are in connection with the words " current year," suggest the interpretation that " former " there means immediately preceding year. Under these circumstances, the High Court could not hear the present special appeal.

*Bhairavnáth Mangesh*, for the appellants, referred to *Rámchandra Raghunáth* v. *Abáji bin Rástyá* (*a*), and contended that a suit for the rent of land was not cognisable by a Small Cause Court, and that, consequently, the present special appeal lay to the High Court.

The preliminary objection having been overruled by the Court for reasons stated in their judgment, the appeal was argued on the merits on the 15th June 1874 before the same Bench.

*Bhairavnáth Mangesh*, for the appellants :—The plaintiffs and defendant Sakhárám are admittedly members of a joint Hindu family, and therefore Mánáji was not justified in paying the rent to Sakhárám alone, unless he could prove Sakhárám to be the manager of the family : *Sangáppá bin Chanbasáppá* v. *Sáhebánná bin Kengedáppá* (*b*), *Doorga Churn Surma* v. *Jampa Dassee* (*c*). Payment of part of the rent to Government was made without any demand on the part of Government, and, therefore, would not bind the plaintiffs.

*Vishnu Ghanashám* (with him *Shámráv Vithal*) *contra* :—The case in 7 Bom. H. C. Rep. 141 does not apply, because the parties in the present case, as would appear from the pleadings and issues, did not proceed on the basis of the principle of the Hindu Law laid down in that case. The case before

(*a*) 6 Bom. H. C. R. 12 A. C. J. (*b*) 7 Bom. H. C. R. 141 A. C. J.
(*c*) 12 Beng. L R. 289.

the Court is simply the case of three joint lessors and one lessee. A plaintiff must be restricted to the case set up in the plaint and pleadings (*d*). A portion of the rent was paid to Government at the request of Sakhárám, one of the joint lessors, as admitted by him in his written statement, and not denied by the plaintiffs. Payment in satisfaction made to one of several joint creditors, discharges the debt against all: Leake on Contracts 486, *Husband* v. *Davis* (*e*), *Brandon* v. *Scott* (*f*). So, accord and satisfaction made with, and accepted by, one of several joint creditors, discharges the debtor as against all: Leake on Contracts, 470.

The judgment of the Court was delivered by

WEST, J. :—It was pressed on us that as this was a suit to recover rent, it was, through the effect of Act XI. of 1865, Section 6, clause 4, and Bombay Regulation XVII. of 1827, Section 31, a case cognisable by a Small Cause Court, and one, therefore, in which no special appeal would lie. This depends on whether, when Act XI. of 1865 was passed, the suit for rent could have been brought before a Revenue Officer. It was said that by Section 36 of the Regulation, the Collector could entertain a suit for rent only for the "current" or "former," *i.e.*, the immediately preceding year, and as this suit was one for rent three years in arrears, the Collector could not have jurisdiction, and the Small Cause Court would. But this construction of the word "former" as equivalent to "immediately preceding," is not one which the ordinary use of the term necessitates, and although the whole expression, "disputes regarding the rent of the current or former year," may at first sight suggest that "former" probably means "the year before," yet a comparison of Section 27 shows that the intention of the Legislature was not thus limited. By that section a superior holder is debarred from recovering arrears of rent due for former years otherwise than by a suit instituted before the Collector, according to the provisions of Chapter VIII., of which Section 31 is the first

(*d*) S. A. 179 of 1873, decided by MELVILL and WEST, JJ., 12th Aug. 1873.
(*e*) 20 L. J. C. P. 118. (*f*) 26 L. J. Q. B. 163.

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section. If it had been intended that there should be no remedy for rent for more than one year in arrears, this would have been plainly said. It is not said, and as for rent in arrears for former years, generally, the superior holder is directed to the Collector's Court. Section 31 must be construed so as to make this direction effective, and the more so as this involves no violation of its grammatical interpretation. As the suit then could have been brought before the Collector, it was not a small cause cognisable, in 1865, by the Small Cause Courts constituted by Act XI. of that year, and a special appeal is not excluded. The two plaintiffs in this case and the defendant Sakhárám joined in a lease to the defendant Mánáji. Mánáji, at Sakhárám's request, paid a portion of the sum due as rent to Government for "chavthái," and the rest he paid to Sakhárám himself. The payment to one of several joint creditors, and at his request, discharges the debt as to all. This is the rule of English law, as shown by the cases cited, and also of the Roman law. It has been argued that the case of *Sangáppá* v. *Sahebánná* is an authority for the claim now set up, but in the present case the three lessors, whatever their relations *inter se*, were, as regards the defendant Mánáji, joint lessors and jointly bound by a payment to any one of their number. The case at 12 Beng. L. R. 289 was one based on a refusal to pay shares of rent remaining unpaid, after the right of several recipients to *aliquot* portions had been recognised. In such a case payment of the whole amount due to one of the co-creditors (who cannot then properly be called joint creditors) does not discharge the debtor as against the others; but the debtors in the Bengal case had, in fact, paid only their own shares to the co-sharers, made defendants along with him. The suit proceeded on the alleged collusion. Here the whole amount due by Mánáji has been paid to Sakhárám, and the suit is not grounded on any alleged fraud in attempting to keep the plaintiffs out of the money due to them. There is nothing to remove the case from the ordinary category of money due to joint creditors and paid to one of their number. As to Sakhárám nothing was claimed rom him. He was made a defendant, because

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he would not be plaintiff. If the plaintiffs had separate rights, this was superfluous. If they had no rights separate from his, it could not cure the defects of the case, as they did not base their suit on an averment of collusion. Sakhárám was a necessary party as plaintiff. We confirm the decree of the District Court with costs.

[APPELLATE CIVIL JURISDICTION.]

June 18.

*Miscellaneous Special Appeal No.* 18 *of* 1873.

GOVIND LAKSHUMAN .....*Appellant.*

NA'RA'YAN MORESHVAR.....*Respondent.*

*Limitation Act IX. of* 1871, *Sec. I., Clause* (a)—*Application for execution of a decree—Suit—Act I. of* 1868, *Section* 6—*Act XIV. of* 1859, *Section* 20—"*Proceeding.*"

The Limitation Act IX. of 1871 comes into operation from 1st July 1871 with respect to appeals and applications, and is not controlled by the General Clauses Act I. of 1868, Section 6.

An application for execution of a decree being made on the 27th September 1871, *Held* not to be a suit within the meaning of Section I., clause (a) of Act IX. of 1871, and, therefore, barred under Schedule II., No. 167 of that Act, as having been made more than three years after the date of the last preceding application.

The application of the 27th September 1871 cannot be regarded as a mere continuation of a proceeding pending, viz., of the last preceding application of the 7th January 1868, within the meaning of Act I. of 1868, Section 6, at the time when the new Limitation Act came into operation, though the order on the latter application having been made on the 31st March 1870, would possibly have been a sufficient proceeding within the 20th section of Act XIV. of 1859, to constitute a fresh terminus, whence time might run under that Act.

THIS was a miscellaneous special appeal from the order of W. H. Crowe, Acting Assistant Judge of Tanna, reversing the order of Mangeshráv Balvant, Subordinate Judge at Pen. The facts of the case are as follows :—

Náráyan Moreshvar obtained a money decree in the Munsiff's Court at Pen against Govind Lakshuman and two others on the 28th June 1864. In execution of that decree, Nárá-

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yan, on the 7th January 1868, applied to the Court for the attachment and levy of certain money in the hands of the Mámlatdár of Pen, belonging to the judgment-debtors. On the representation of the Mámlatdár that the money was not available, the Court, on the 31st March 1870, disposed of the application as struck off from the file. On the 27th September 1871, Náráyan again applied for the execution of his decree. The Subordinate Judge, Mr. Mangeshráv Balvant, rejected the application as barred by the new Limitation Act IX. of 1871, inasmuch as it had not been made within three years from the date of the last previous application, as required by Schedule II., Article 167. In appeal, Mr. Crowe reversed that order, and granted execution. His reasons are contained in the following extract from his judgment given in another similar case :—

" The issue for decision is, whether an application for the execution of a decree properly comes under the denomination of the word ' suit' so as to render the provisions of Act IX. of 1871, Section I., clause (a) applicable to it.

" I find that applications for execution of decrees do come within the denomination of the word ' suit,' and that the provisions of the law mentioned above do apply to them.

" Act IX. of 1871 (the Indian Limitation Act) makes certain provisions for the limitation of suits, appeals, &c. By Section 1, clause (a), nothing contained in sections 2nd and 3rd of the Act, or in parts 2nd and 3rd of the Act, applies to suits instituted before the first day of April 1871.

" Section 2 repeals Act XIV. of 1859, in so far as it applies to the limitation of suits, and by Section 20 of that Act " no process of execution shall issue unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution.

" Whereas by this old law any proceeding of the kind described above was sufficient to keep alive the claim for three

years by the present law, there must be an application for execution every three years to keep the right alive (Schedule II., No. 167), so that although proceedings were pending upon one application, the application itself must be renewed within three years.

"Now No. 167 in the second schedule of the new Act is classed in the third division, *i.e.*, that relating to applications, and not in the first division, which relates to suits. Apparently, therefore, the Legislature treated such applications as distinct from suits, but I do not think that such an interpretation would be consistent. The plaintiff, who has merely got an empty decree, cannot be said to have obtained the relief he sought. He is still a suitor until he has obtained process of execution, and up to that time he will prosecute his suit. The substantial relief is what he wants, not the nominal decree in his favour. His application for execution is partly his suit—the final step—and, therefore, I am of opinion that such applications are governed by Section 1, clause (a) of the new Limitation Act, and that they are not barred by the operation of that Act."

Govind Lakshuman, dissatisfied with the Assistant Judge's order, preferred a special appeal to the High Court, which was heard by WESTROPP, C.J., and WEST, J.

*Vishnu Ghanashám*, on behalf of the appellant, contended that the Assistant Judge was wrong in holding an application for the execution of a decree to be a "suit" within the meaning of Section 1, clause (a) of Act IX. of 1871. Such a construction is opposed to the preamble and Section 4 of the Act. They refer to suits, appeals, and applications as distinct from each other. Part II. is headed "Limitation of Suits, Appeals, and Applications," which shows that an application is not a suit. The exception in the first section is perfectly explicit, and excludes from the operation of the new Limitation Act only suits general and special, the former until the 1st April 1873. Moreover, the Act provides limitation for suits and applications under different divisions, of which the first refers to suits and the third to applications

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[WESTROPP, C.J., referred to *Nundo Coomár Mukerji* v. *Issur Chunder Bhuttacharji* (*a*).]

*Ganpatráv Bháskar*, for the respondent, referred to the word "execution" in Wharton's Law Lexicon, p. 342, and argued that execution of a decree was the last stage of a suit, and that, therefore, an application for such execution was part of a suit. The Subordinate Court had no power to strike off the respondent's application of the 7th January 1868, in the way it did on the 30th March 1870: *Ghanr Mohan Bandhopádhyá* v. *Táráchand Bandhopádhyá* (*b*). His present application of the 27th September 1871, therefore, must be regarded as a continuation of the previous one, which was only disposed of to clear the Court's file at the end of the official year. The execution proceedings consequently having commenced before the new Limitation Act came into force, were not affected by that Act, under the General Clauses Act I. of 1868, Section 6.

The following decision of the Court was given by

WESTROPP, C.J. :—The Assistant Judge has held that the application for execution of the decree of the 28th June 1864, being made in a suit instituted before the 1st April 1873, comes within the exception contained in Section 1, clause (a) of the Indian Limitation Act IX. of 1871, and, therefore, that the question whether this application for execution is in time, must be decided by Act XIV. of 1859, Section 20, and not by the Indian Limitation Act of 1871 ; and the learned pleader for the respondent seeks to support the Assistant Judge's decision by the 6th section of the General Clauses Act I. of 1868. We, however, think that this application does not fall within the term "suits" used in the exception, contained in Section 1, clause (a) of the Indian Limitation Act of 1871. The 4th section of that Act too clearly makes the distinction between suits instituted, and appeals presented, and applications made, to admit of our holding an application for exe-

(*a*) 12 Beng. L. R. 9 Appx.
(*b*) 3 Beng. L. R. 17 Appx.

cution to be, within the meaning of the Act, part of a suit. The same distinction is equally preserved in the second schedule of the Act, the first division of which schedule is appropriated to suits, the second to appeals, and the third to applications; in which last mentioned division, the Legislature expressly deals with applications for the enforcement of decrees or orders. The same view as that which we have taken of the construction of the term "suits" in the exception, has been acted upon by L. Jackson and Mitter, JJ., in *Nando Coomár Mukerji* v. *Issur Chunder Bhuttacharji*. The provision in the 1st section that the Act (which received the Governor General's assent on the 24th March 1871) should come into force on the 1st day of July 1871, would be completely nullified by holding that the exception of suits instituted before the 1st day of April 1873 included appeals presented and applications made before that day, inasmuch as such a ruling would leave nothing upon which the Act could operate during the period from the 1st of July 1871 to the 1st day of April 1873. We think that the intention of the Legislature, as manifested in the Act itself, is clear that it should operate from the 1st of July of 1871 upon appeals and applications, and that being so, we cannot hold it to be controlled in that particular respect by Section 6 of the General Clauses Act of 1868. And we further are of opinion that the present application cannot be regarded as a mere continuation of a proceeding pending, within the meaning of that section, at the time at which the Indian Limitation Act of 1871, which repealed the Act of 1859, came into operation. The last previous application for execution of the decree in this case was made on the 7th January 1868, and an order for execution was made upon it on the same day. No money was realized under that order, and the Subordinate Judge, having received a communication from the Mámlatdár to the effect that no money was then available for levy under the execution, made an order, on the 31st March 1870, to the effect that the application was disposed of. Against that order the execution-creditor has not made an appeal, and the time for appealing has long since elapsed. Possibly that order,

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being within three years of the date of the present application (27th September 1871), would have been a sufficient proceeding within the 20th section of Act XIV. of 1859, to constitute a fresh terminus, whence time might run under that Act: *Máhárájáh Dheeráj Mahtáb Chund* v. *Bulrámsing* (c). But the Indian Limitation Act of 1871, Schedule II., No. 167, is more strict; the three years are to run, not from the date of the last "proceeding" taken to enforce the judgment, decree, or order, but from the date of applying to the Court to enforce, or keep in force the decree or order. It is impossible to treat the order of the 31st March 1870 (by which the application of the 7th January 1868 was in substance struck off the file, as completely disposed of,) as an application to enforce the decree. So far as the Subordinate Judge could comply with the application of the 7th January 1868, he had complied with it on the day on which it was made. The process of execution, then granted, proved to be abortive, and the order of the 31st March 1870 was the consequence. Four months' time was allowed for the execution of the 7th January 1868, and had expired long before the 31st March 1870.

The arguments of the learned Assistant Judge, contained in his judgment in another case to which he refers, seeming to us to be rather reasoning against the policy of the Indian Limitation Act of 1871, than founded upon its construction and language, we must reverse his order and restore that of the Subordinate Judge. But we direct that each party should bear his own costs of the application and of both appeals.

NOTE.—This case was cited, and followed in Miscellaneous Special Appeal No. 1 of 1874 (*Bálkrishna* v. *Ganesh*), decided by WESTROPP, C.J., and KEMBALL, J., on the 30th July 1874. The following is the judgment:—

WESTROPP, C. J.:—The Assistant Judge has erroneously applied Act XIV. of 1859 to this case, in which the application under present consideration was made on the 18th July 1872. As regards appeals and applications, as distinguished from suits, the new Limitation Act, IX. of 1871, came into force upon the 1st of July 1871 (see *Govindráv* v. *Náráyan*, Misc: Special

(c) 13 Moore I. A. 479.

Appeal 18 of 1873, decided on the 18th June 1874, and *Nándo Coomár Mukerji* v. *Issur Chunder Bhuttacharji*, 12 Beng. L. R. 9 Appendix). The exception of suits in Section I., Cl. A, does not include an application, such as the present. The time runs under that Act in the case of decrees or orders "from the date of applying to the Court to enforce or keep in force the decree or order"—Schedule II., Division III., pl. 167. There was an application for enforcement of the decree in 1870, which was dismissed on the 25th February 1871 on the ground of the non-payment of *bhattá*. Were it necessary to go into the *bona fides* of that application as a means of enforcing the decree, sufficient appears in evidence to show that it was *bonâ fide*, for the defendant's Vakil, before the Subordinate Judge, admitted that his client, on the 23rd February 1871, satisfied the plaintiff to the extent of Rs. 36-0-4, part of the moneys awarded to him by the decree in 1864, but even an application for the mere purpose of keeping the decree in force, as distinguished from enforcing it, would be sufficient under the Act of 1871. We must reverse the order of the Assistant Judge with costs, and direct him to hear the application on the merits, if any, as we are of opinion that the application is not barred by limitation.

[APPELLATE CRIMINAL JURISDICTION.]

June 25.

THE GOVERNMENT OF BOMBAY.....*Appellants.*

*In the matter of* REG. *v.* DORA'BJI BA'LA'BHA'I and others.

*The Code of Criminal Procedure, Secs. 272 and 297—Act XI. of 1874, Sec. 23—Appeal by Government—Limitation.*

Under Section 272 of the Code of Criminal Procedure, as amended by Section 23 of Act XI. of 1874, an appeal against an acquittal presented by the Government six months after the date of the judgment complained of, is barred by lapse of time, even though the six months expired on the day the amending Act became law.

The amended Section 272 should be read by itself, and not as a clause of the ordinary Statute of Limitations.

The Court will not, under Section 297 of the Code of Criminal Procedure, interfere with an acquittal.

THIS was an appeal by the Government of Bombay, under Section 272 of the Code of Criminal Procedure, against an order of acquittal passed on Dorábji Bálábhái and others, who were tried for murder by W. M. P. Coghlan, Sessions Judge of Tanna.

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The appeal was heard by WEST and LARPENT, JJ.

*Scoble*, Advocate General (with him *Dhirajlál Mathurá-dás*, Government Pleader,) for the Government.

The facts fully appear from the following judgment:—

PER CURIAM:—The Court of Session in this case found, at the close of the case for the prosecution in a trial for murder, that there were no grounds for proceeding, and acquitted the accused.

This occurred on the 6th November 1873. It afterwards appeared that the principal witness for the prosecution, one Hormasji, who had been admitted as an approver on a conditional pardon, had given false evidence. For this he was tried and punished in February 1874.

The Advocate General, on behalf of the Government, now desires to present an appeal under Section 272 of the Code of Criminal Procedure against the acquittal of the accused in the trial for murder. The confession of Hormasji, he urges, makes it clear that his statement made before the Magistrate, not the one made before the Court of Session, was the true one, and that reference being made to the former, the prisoners ought to have been convicted. He asks that a new trial may be ordered.

The present appeal was filed on the 5th June 1874. On the 5th May an Amending Act (XI. of 1874) became law, by which Section 272 of the Code of Criminal Procedure is modified. It is now prescribed that no appeal under that enactment shall be presented more than six months after the date of the judgment complained of. The six months in this case ended on the 5th May, the day on which the Amending Act became law; and it has been argued that as there was no possibility of complying with the terms of the new enactment, after it had become law, so as to exclude the bar which it imposes, the appeal should now be entertained and dealt with. It has been further urged that the limitation of six months, being in *pari materia* with the restrictions on ordi-

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nary criminal appeals, should be read as part of the Limitation Act, IX. of 1871, which imposes those restrictions, and as subject, therefore, to relaxation by the Court at its discretion under the circumstances provided for by Section 5 of the Act. But an Act of limitation, being a law of procedure, governs all proceedings to which its terms are applicable from the moment of its enactment, except so far as its operation is expressly excluded or postponed. In the present instance the Legislature has imposed an absolute bar on our entertaining an appeal after six months from the date of the judgment, and where that is so, the only exception that can be allowed from the strict terms of the enactment, arises in such a case as that of *Mayer* v. *Harding* (*a*), where, what it was necessary to do, could not be done on any day within the given time, owing to the Court's being closed for the whole of the time. Here the Court was accessible for the six months, or for a few days short of the six months, and when the Legislature imposed the bar, it made no reservation, as it frequently does, of proceedings taken within a certain time after its enactment. Had the new law been intended to be read as a clause of the Limitation Act, this would have been plainly expressed. The section, as it stood formerly, excluded the operation of the Limitation Act, so that the provisions of the latter must have been present to the mind of the Legislature in framing the amendment; and in imposing an absolute bar on appeals against acquittals, the Government may have been actuated by quite a different policy from that which led it to allow a certain discretion in the case of other appeals. In the case of *Hari* v. *Vishnu* (*b*), the Court refused to regard a limitation, prescribed by Section 42 of Bombay Act VII. of 1867, as equivalent to an additional clause of the Limitation Act, and the present is a case in which a discretion is not to be assumed when it is not granted in the clearest terms.

It was suggested that we might call for the case in the exercise of our powers of revision under Section 294 of the Code of Criminal Procedure, but we are of opinion that we

(*a*) L. R. 2 Q. B. 410. (*b*) 10 Bom. H. C. Rep. 204.

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could not, under Section 297, deal with the case as one of simple discharge of the prisoners. With an acquittal the Court will not, under that section, interfere, as was ruled in the case of *Reg.* v. *Pirkhán Jámà*, 21st May 1873. We must, therefore, reject the application.

*Appeal rejected.*

[APPELLATE CRIMINAL JURISDICTION.]

*Criminal Reference No.* 48 *of* 1874.

June 25.

REG. *v.* UTTAMCHAND KAPURCHAND and others.

*The Code of Criminal Procedure, Sec.* 119—*The Indian Evidence Act, Secs.* 91 155, *and* 159—*Statements made to the Police.*

Section 119 of the Code of Criminal Procedure not making it obligatory upon a police officer to reduce to writing any statements made to him during an investigation, neither that section, nor Section 91 of the Indian Evidence Act, renders oral evidence of such statements inadmissible. If the statements be actually reduced to writing, the writing itself cannot be treated as part of the record or used as evidence, but may be used for the purpose of refreshing memory under Section 159 of the Evidence Act. Consequently, the person making the statements may properly be questioned about them; and, with a view to impeach his credit, the police officer himself, or any other person in whose hearing the statements were made, can be examined on the point under Section 155 of the Evidence Act.

THIS was a reference by H. M. Birdwood, Acting Session Judge at Surat, reporting, under Section 296 of the Code of Criminial Procedure, the proceedings of Jagjivandás Khusháldás, Magistrate, 1st Class, in the case of the accused Uttamchand and others.

The material facts of the case are as follows:—

The accused were convicted of an offence under Section 152 of the Indian Penal Code; one of them was also convicted in addition under Section 323. With the exception of Navalchand, whose conviction and sentence were reversed on appeal by the Court of Session, the other accused were sentenced to fines of a smaller amount than Rs. 50, and had, consequently, no right of appeal; but they

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complained to the Court of Session that the witnesses for the prosecution contradicted, before the Magistrate, statements which they had previously made to the police, and that they, the accused, were not allowed to prove these contradictions. The Magistrate, being called upon to explain, stated that he objected to the cross-examination, because, under Section 119 of the Code of Criminal Procedure, any statement made before the police, by a witness, could not be treated as part of a record or used as evidence in a criminal trial. The Session Judge was of opinion that the evidence refused was admissible to impeach the credit of the witnesses for the prosecution, and he, therefore, reported the case for the orders of the High Court.

The reference was heard by NA'NA'BHA'I HARIDA'S and LARPENT, JJ.

The parties were not represented.

The judgment of the Court was delivered by

NA'NA'BHA'I HARIDA'S, J.—The object of a trial in every case is to ascertain the truth in respect of the charge made. For this purpose it is necessary that the Court should be in a position to estimate, at its true worth, the evidence given by each witness, and nothing that is calculated to assist it in doing so ought to be excluded, unless, for reasons of public policy, the law expressly requires its exclusion. Bearing this in mind, let us see how the case stands here.

It is complained in this case that the accused were not permitted to elicit from witnesses for the prosecution that they or some of them had before made statements inconsistent with their evidence before the First Class Magistrate. This is admitted by the First Class Magistrate, whose reason for so refusing permission we shall presently consider. When it is intended to throw discredit upon the evidence of any witness for the prosecution, nothing is more common in practice than for the counsel for the defence to prove, if it can be proved, that that witness has previously made statements inconsistent with his evidence at the trial. When this fact is satisfactorily

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established, the Court cannot but regard the evidence of such witness with suspicion, and the fact is established by the evidence of any one to whom such statements were made, or in whose presence and hearing they were made. But the First Class Magistrate is of opinion that if the statements are made to a policeman, who chooses, under Section 119 of the Code of Criminal Procedure, to reduce them to writing, they are, by that section, rendered inadmissible, and cannot be proved by the evidence of witnesses to whom or in whose hearing they were made. If the section were capable of no other construction than the one the Magistrate has put upon it, we should be bound to adopt that view, though thereby the criminal courts and counsel for the defence should be deprived of one of the modes of testing evidence adduced for the prosecution. But we are of opinion that the Magistrate has misunderstood the meaning of that section, which runs thus :—

"An officer in charge of the police station, or other police officer making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

"Such person shall be bound to answer all questions relating to the case, put him by such officer, other than questions criminating himself.

"No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence."

The meaning of the section, so far as it has reference to the point we are now considering, is this.

A police officer may examine any person acquainted with the facts of the case.

He is not bound to reduce into writing any statement made by that person, though, if he wishes to do so, he may reduce it into writing.

If he does so, such written statement shall not be treated at the trial as part of the record or as evidence, which means that though it may be used by the police officer to aid him in his investigation, it is not to be used by the prosecution as evidence to establish the accused's guilt.

To our minds it is clear, from the wording of the section itself, that when a person makes a statement to a police officer which is not "reduced into writing" by him, such statement is not inadmissible in evidence under this section, since it does not profess to provide for such a case. The police officer may, therefore, be questioned as to such statement by the counsel for the defence, as also any other person who may have heard it made. And it is equally clear that when it is "reduced into writing," the section does not say that the police officer, or such other person, shall not be liable to be questioned as to it, or bound to state the truth when so questioned, but that the "statement so reduced into writing" (that is, the writing itself,) shall not be "used as evidence." Consequently, the police officer and such other person, if any, notwithstanding Section 119 of the Criminal Procedure Code, continue as liable to be questioned with regard to such statement as they were before its enactment, and may, under Section 159 of Act I. of 1872, make use of such writing to refresh their memories, though the writing itself cannot be "used as evidence." The rule which is laid down in Section 155 of that Act, that "the credit of a witness may be impeached" * * * * * * * "By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted," and which has always been the rule of evidence both in England and in India, is thus left untouched by the subsequent enactment, Section 119 of the Code of Criminal Procedure. This view of ours, though it might at first sight seem opposed to Section 91 of the Evidence Act, is not in reality so, as the statement made to the police officer is not a matter required by a law to be "reduced to the form of a document," so as, under that section, to exclude oral evidence thereof from the mouth of the police officer, or such other person.

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Such being our view on this point, we are of opinion that the Magistrate was wrong in not permitting the accused to show, by eliciting answers to that effect in cross-examination, that the witnesses for the prosecution, or some of them, had previously made statements inconsistent with their evidence in Court. This was "a material error" on his part within the meaning of Section 297 of the Code of Criminal Procedure. We must, therefore, reverse the conviction, and send the case back, in order that he may pass a new judgment in the case, after allowing the accused to show, if they can, that any of the witnesses for the prosecution have made inconsistent statements, and are, therefore, not worthy of belief, and after recalling for that purpose any of such witnesses as the accused may desire to recall under Section 218 of the Criminal Procedure Code. In any judgment he may pass after doing so, the Magistrate should be directed to comply with the provisions of Section 464 of the Criminal Procedure Code.

*Order accordingly.*

[APPELLATE CRIMINAL JURISDICTION.] 1874. July 2.

*Application under the Extraordinary Jurisdiction.*

REG. *v.* SAKHA'RA'M MANOHAR.

*The Code of Criminal Procedure, Sections,* 283, 297, *and* 300—"*Material error*"—*Misappreciation of evidence—Powers of the High Court.*

The expression "material error" in Section 297 of the Code of Criminal Procedure does not include error in appreciating evidence, and the High Court, which, as a Court of Revision, is as much bound as a Court of Appeal by the provisions of Section 283 of the Code extended by Section 300, will not be justified in rectifying an error merely in the appreciation of evidence, nor, even an error in law, unless it be shown to the Court that such error has caused a failure of justice.

THIS was an application for the exercise of the Court's extraordinary jurisdiction. The accused was convicted by A. Wingate, Magistrate, First Class, Satara, under Section 161 of the Indian Penal Code.

The application was heard by NA'NA'BHA'I HARIDA'S and LARPENT, JJ.

*V. N. Mandlik* for the appellant.

*Dhirajlál Mathurádás*, Government Pleader, for the Crown.

The facts sufficiently appear from the judgment of the Court delivered by

NA'NA'BHA'I HARIDA'S, J.:—In this case the record and proceedings have been sent for under Section 294 of the Code of Criminal Procedure, and we have looked into them as a Court of Revision. The petitioner has also appeared before us, and urged that the decision of the Magistrate, Mr. Wingate, is tainted with illegality, inasmuch as he has imported into this case evidence taken in another, and relied upon statements of witnesses which, as regards the present charge, are perfectly irrelevant, and otherwise inadmissible. The question we have, therefore, to decide in this case is, whether a "material error" within the meaning of Section 297 of the Criminal Procedure Code has been committed by the Magistrate. The charge against the petitioner, which the Magistrate has held proved, and with which alone we are at present concerned, was that he, the petitioner, being a public

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servant, committed an offence punishable under Section 161 of the Indian Penal Code, by accepting from one Zagu Rs. 15, the same not being a legal remuneration, as a motive for showing to him, Zagu, favour in the exercise of his official functions, *i. e.*, by promising him an appointment. In considering this charge, the Magistrate takes into account a statement made by Antáji, a witness, as to an alleged payment by one Lakshuman of Rs. 5 to the petitioner, the subject-matter of another charge upon which he was acquitted, and also another statement by Antáji, that "one Krishnáji told him that Rs. 14 had been stopped from his pay." He further takes into account a statement (not recorded), alleged to have been made to him by the Rahimatpur Post Master (not examined as a witness in the case), to the effect that "he heard accused try to pay off two of the complainants," and comes to the conclusion that "the accused seems to have largely introduced the purchase system." It is urged before us that the admission of this evidence has vitiated the conviction, and that it should, on that ground, be set aside. The Government Pleader, on the other side, contends that if there was any illegality in admitting that evidence, there was other evidence, not liable to any such objection, and quite sufficient for the Magistrate to convict the accused upon, and he points out to us the statement of the complainant Zagu himself as to the delivery of Rs. 15. If Zagu is to be believed, we cannot say that his statement is in law insufficient for conviction (Section 134, Act. I. of 1872). Therefore, even if it stood alone, we could not reverse the conviction; but there is also the evidence of Námá, not specially noticed by the Magistrate, which fully corroborates it. He says he was present when the Rs. 15 were paid by Zagu to Antobá, who paid the same over to the accused. The Magistrate has, upon this evidence, based the conviction complained of, and it is impossible for us to say that he had not materials before him to come to the conclusion he did.

But it is urged by Ráv Sáheb Vishvanáth Náráyan Mandlik, for the petitioner, that those statements are flatly contra-

dicted by Antáji, another witness for the prosecution, and that, under the circumstances, the Magistrate ought not to have recorded a conviction. It is pressed upon us that the expression " material error " in Section 297 of the Code of Criminal Procedure is comprehensive enough to include error in appreciating evidence, as well as error in law, and that as the Magistrate has committed an error, inasmuch as he has misappreciated the statements in question, his error may, and ought, to be rectified by the High Court interfering with his finding. We are thus asked to go further than any High Court has, to our knowledge, yet gone in the exercise of its power of revision. The practice of this Court has been not to notice any but errors of law affecting the merits or justice of the case, always accepting the facts as found by the Lower Court, and the practice of the Bengal High Court also is the same as ours in this respect: See *Reg. v. Debi Churn Biswás* (*a*), *Abdool Huq Chowdhry* v. *Idrak* (*b*). If the present contention is to be considered good, there is hardly a case in which some violation of the law of evidence may not be laid hold of to obtain the reversal of a Magistrate's finding. Could such a result have ever been intended? The Legislature obviously intended the evidence, in certain cases, to be considered and appreciated by one Court only, by expressly prohibiting an appeal in them, and we do not think it was intended virtually to give, in an indirect way by Section 297, that which was thus directly denied by Section 273 of the Code of Criminal Procedure.

Section 283 of the Code forbids an Appellate Court interfering, except in cases in which it may appear that there has been a failure of justice. This section has been extended, by Section 300, to courts of revision. We are, therefore, as much bound by its provisions as a court of appeal. Mere errors in law are not sufficient to warrant a reversal of the Magistrate's decision. It must be shown that they caused a failure of justice. Finding on the record the evidence to which the Government Pleader has drawn our attention, and

(*a*) 20 Calc. W. R. Cr. Rul. 40. (*b*) 21 *Id.* Cr. Rul. 57.

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which the Magistrate has chosen to believe, we cannot interfere. It seems, however, that upon similar evidence in other cases against the petitioner, the Session Judge, on appeal, arrived at conclusions different from those of the Magistrate, and if we may hazard an opinion on such a matter, it is not at all unlikely that the same Session Judge would have differed from the Magistrate in his view of the evidence in this case also, could it have been taken before him in appeal. But be that as it may, as the law at present stands, we are not in a position to interfere with the Magistrate's finding. We must, therefore, reject the petition of Sakhárám Manohar, and return the record and proceedings. The petitioner may, if so advised, represent his case to Government to remit the sentence.

We may observe that the judgment in this case has not been drawn up in accordance with Section 464, Criminal Procedure Code, and we must direct the Magistrate in future to follow strictly the provisions of that section.

*Petition rejected.*

[APPELLATE CIVIL JURISDICTION.]

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July 6.

*Special Appeal No.* 17 *of* 1874.

GIRDHAR NA'GJISHET .....*Appellant.*

GANPAT MOROBA' and BHA'GIRTHIBA'I KOM MOROBA' .....*Respondents.*

*Regulation XVIII. of* 1827, *Section* 10 *et seq.—Objection to the validity of a document —Objection on the merits.*

An objection to the validity of a document under Regulation XVIII. of 1827, as distinguished from its inadmissibility in evidence, or from a prohibition to courts of justice or public officers to act upon it, *is* an objection on the merits under Act VIII. of 1859.

Where two documents were executed in the Island of Bombay, respectively, under date the 29th August 1851 and 4th August 1852, and did not appear to have been originally *expressly* intended to operate within any of the zillahs subordinate to the Presidency of Bombay, *Held* that they did not come within the scope of Regulation XVIII. of 1827. That regulation, being an enactment imposing stamp duties upon the subject, must be strictly construed, and although the High Court believed that those documents were *actually* intended to operate, so far as the particular property in question in the suit was concerned, in the zillah of Tanna, the High Court declined to hold "expressly" to mean the same as "actually," as nothing appeared on the face of either of those documents to show where the property mentioned in them was situated.

*A* and *B*, two undivided Hindu brothers, conveyed to their mother, *C*, one-third share in the ancestral property of the family by a deed of sale, dated 29th August 1851. Subsequently, *A* sold his one-third share in the joint ancestral property to *B* by a deed dated the 4th August 1852. In a suit brought by a judgment-creditor of *A* in 1868 to recover *A*'s half share in the joint property from *B* and *C*, the plaintiff gave in evidence proceedings taken by *A* jointly with his brother *B* in 1856 against a third person, relating to the joint property, with a view to show that the two documents were illusory, and intended to screen *A*'s share from execution by his creditors:

*Held* that such proceedings were important and relevant evidence, in order to test the *bona fides* with which *A* executed the two documents, as it was important to ascertain how *A* subsequently demeaned himself with regard to the property, his share or interest in which he purported to convey by those documents.

THIS was a special appeal from the decision of W. H. Crowe, Assistant Judge at Tanna, reversing the decree of the Subordinate Judge of Panwel.

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Girdhar Nágjishet brought this suit to establish the right of his judgment-debtor, Bhagvantráv Morobá, to half of the ancestral property in the possession of his brother, Ganpatráv Morobá, and his mother Bhágirthibái. The defendants pleaded partition of the family property into three equal shares, two of which were allotted respectively to the two brothers and the remaining one to their mother (Exhibit No. 10). They further stated that subsequent to this partition, Bhagvantráv had sold his one-third share to Ganpatráv Morobá by a deed (Exhibit No. 9) dated the 4th August 1852. The Subordinate Judge decreed the plaintiff's claim in his favour. That decree, however, was reversed in appeal by the Assistant Judge, for reasons which are contained in the following extract from his judgment:—

"The plaintiff sues to have certain land declared to be the property of his judgment-debtor, Bhagvantráv Morobá. The defendants admit that the property formed originally part of their ancestral immoveable property, but allege that they purchased the share of the plaintiff's judgment-debtor, Bhagvantráv. The 3rd issue relates to the *onus probandi*, which, in my opinion, rests clearly on the plaintiff. It is for him to show that the property in dispute is the property of his judgment-debtor, or was so at the date of attachment. The plaintiff is in a position not differing from that of any other plaintiff, and must prove his case. This case differs from that of *Nathu Sadáshiv* v. *Rámchandra Annáji* (*a*), where it was held that the *onus* lay, not on the decree holder, but on the intervenor, inasmuch as in that case the plaintiff had already been unsuccessful in an application under Section 246 of the Civil Procedure Code.

"The defendants admit that the property was originally ancestral, and that they became possessed of Bhagvantráv's share by a deed of acquittance. Now, bearing in mind the presumption of Hindu law regarding joint property and joint families, I opine that the *onus* is now shifted on to the defend-

(*a*) 5 Bom. H. C. R. 76 A.C.J.

ants, and that it will be for them to show that they became the purchasers of the share of Bhagvantráv. With this view Exhibits Nos. 9 and 10 are recorded in the case, and objection to their being admitted is taken by the pleader for the plaintiff on the ground of their not being stamped. On a reference to the stamp law bearing on the point, Regulation XVIII. of 1827, Section 11, it appears that Nos. 9 and 10, though executed beyond the zillahs subordinate to the Presidency of Bombay, yet, being intended to take effect within those zillahs, are not valid, unless duly stamped. The question now arises whether their having been admitted is a ground for reversing the decision. Section 350 of the Civil Procedure Code provides that no decree shall be reversed on account of any irregularity or error not affecting the merits of the case. It is true that the plaintiff raised an objection to the admission of these documents in the Court of first instance, but this objection having been overruled, I am inclined to be guided by the precedents in the High Court of Calcutta, and to hold that the irregularity, though it affected the Government revenue, did not affect the merits of the case: *Mark Ridded Currie* v. *S. V. Mutti Ramen Chitty* (*b*), *Lalji Sing* v. *Syad Akram Ser* (*c*), *Shrimath Saha* v. *Saroda Gobindo Chowdhry* (*d*), *Enayetoollah* v. *Shaikh Meajan* (*e*). I know of no ruling on this point by the High Court of Bombay by which I could be guided. Exhibit No. 10 is a deed of sale dated August 1851, by which a one-third share of the estate, which Bhagvantráv Morobá and Ganpatráv Morobá inherited from their father, is sold to his widow, Bhágirthibái, defendant No. 2. Exhibit No. 9 is a deed of sale by which Bhagvantráv disposes of his entire right, title, and interest in the ancestral property to the two present defendants. It is dated 1852, or 13 years before the institution of the present suit. The execution of these two documents is proved by witnesses Nos. 90 and 101. The Lower Court refused to record the evidence of witness No. 90, under Section 179 of the Civil Procedure Code. I consider this order was a wrong one. Section 179

(*b*) 3 Beng. L. R. 126 A. C. J. (*c*) *Id.* Ib. 235.

(*d*) 5 Beng. L. R. 10 Appx. (*e*) 16 Calc. W. R. 6 Civ. Rul.

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provides that a deposition taken under a Commission shall not be read in evidence without the consent of the party against whom it may be offered, unless it be proved that the deponent is beyond the jurisdiction of the court, &c., &c. Now, the deponent in the present instance was a resident of the town of Bombay, as appears from the deposition itself, and, therefore, beyond the jurisdiction of the court of Panwel. There was no necessity, therefore, to prove the sickness of the deponent, as on the other ground the deposition was admissible without question.

"Regarding these two documents, Nos. 9 and 10, the contention of the plaintiff is that they are collusive, and he relies on the want of adequate consideration, as shown by the documents themselves and on witnesses Nos. 31 and 72 and the position of the parties to those deeds. Though the documents are in the nature of deeds, that is to say, written instruments sealed and delivered, if fraud be proved, they will be considered void. Exhibit No. 10 purports to convey from Bhagvantráv Morobá and his brother, Ganpatráv Morobá, to their mother, Bhagirthibái, a one-third share of their deceased father's estate, in consideration of a sum of Rs. 3,001 being paid by Bhágirthibái in cash. The payment of the money is attested separately at the end of the deed, and witness No. 90 speaks to the fact of its having been made. Exhibit No. 9 assigns the entire interest of Bhagvantráv in the ancestral property to his mother and brother for the sum of Rs. 15,600, to which amount he had incurred debts. The reason assigned for this transaction is, that Bhagvantráv was a man of extravagant habits, and was in debt. It is contended by the defendants that these two deeds operate as a deed of partition of the family property, and that certainly is the effect of them, or rather of No. 9. It may well be that the defendants, seeing a probability of their family estates being wasted by the lavishness of the elder son, would be only too glad to get him out of the concern by any means in their power, and it is only natural to suppose that Bhagvantráv, if, as he is described, he was a man of spendthrift habits, would be ready to part

with his interest in the property for sums of money in cash. It is not contended that the property has ever been divided, and a number of precedents are quoted to show that it is not necessary for a partition in the estate that there should be any actual division of the lands: *Mussamut Jusoda Koonwar* v. *Gourie Byjonáth Sohae Sing* (*f*), *Lalla Shriper-shad* v. *Mussamut Akoonjoo Koonwar* (*g*), *Lalla Mohabeer Per-shád* v. *Mussámut Kundur Koowar* (*h*), *Appovier* v. *Rámá Subba Aiyan* (*i*). All that is required by Hindu Law being that the shares shall be defined, and that there shall be distinct and independent enjoyment. Witnesses Nos. 31, 36, 37, 89, 90, all prove that Bhagvantráv is separated from the family, and though the sale to relations is open to suspicion, yet, under the circumstances of this case, there is nothing to show that it was made at this long interval of time with a view to defraud creditors, or that it is tainted with fraud in any way. The plaintiff relies further, to some extent, on the evidence of No. 31, who proves that five or six years before his deceased brother received an *ákhtiár patra* from Ganpatráv and Bhagvantráv together, and that their joint interest may be presumed therefrom. He states, however, that Bhagvantráv had nothing to do with the produce of the land, and that Ganpatráv was in enjoyment of it. Similarly No. 72 is relied on to show that the two brothers sued together as co-plaintiffs in respect to certain ancestral property, and, although this decree was not between the same parties, yet it should be used in favour of a stranger against one of the parties thereto for what it is worth, following the ruling in *Bhyrub Nath Toee* v. *Kally Chunder Chowdhry* (*j*). There is one fatal objection to its being used, or at least too much weight being attached to it, that the suit was brought in 1856 before Act VIII. of 1859 came into operation.

"I consider that the circumstances of the present case do not warrant the presumption of fraud. The contract of sale (Exhibit No. 9) between the brothers is evidence, to my

(*f*) 6 Calc. W. R. 139 Civ. Rul. (*g*) 7 *Idem.* 488 Civ. Rul.
(*h*) 8 *Idem.* 116 Civ. Rul. (*i*) 11 Moore I. A. 75.
(*j*) 16 Calc. W. R. 112 Civ. Rul.

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mind, of a partition of estate, and, if Bhagvantráv had remained in enjoyment of any share of the family property from 1852 up to the date of the present suit, evidence of such enjoyment would have been forthcoming. I consider that the interest possessed by Bhagvantráv did pass to the defendants by Exhibit No. 9, and that their title is valid and good. I reverse the decree of the Lower Court, and find for the appellants. Costs on the respondent throughout."

In special appeal it was contented, on behalf of the plaintiff, that (I.) Exhibits 9 and 10 were invalid for want of the proper stamps and should not have been admitted, and (II.) the objection to using Exhibit No. 72 against the respondents was not valid.

The special appeal was argued before WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J.

*Vishvanáth Náráyan Mandlik* for the special appellant.

*Nagindás Tulsidás* for the special respondents.

The judgment of the Court was delivered by

WESTROPP, C.J. :—The plaintiffs, in their appeal, allege that the documents of the 29th August 1851 (Exhibit No. 10) and the 4th of August 1852 (Exhibit No. 9) are, under Regulation XVIII. of 1827, Sec. 10 *et seq.* (the stamp law for the mofussil of this Presidency in force at their respective dates), invalid, as being unstamped.

The defendants say that such an objection is not open to the plaintiffs on appeal or special appeal, the Subordinate Judge having admitted those documents in evidence which were objected to before him as being unstamped, and that his decision as to their admissibility is conclusive. For this proposition the defendants rely on the cases reported at 16 Calc. W. R. 6 Civ. R.; 11 Calc. W. R. 520; 3 Beng. L. R. 126, 235; 5 Beng. L. R. Appx. 10, as showing that the objection is not an objection on the merits or to the jurisdiction, and, therefore, not within Section 350 of the Civil Procedure Code.

But the enactments, on which those cases were decided, do not declare unstamped documents to be invalid, as does Regulation XVIII. of 1827. We, therefore, regard those cases as inapplicable to the present question, as we are clearly of opinion that an objection to the validity of a document, as distinguished from its inadmissibility in evidence, or from a prohibition to courts of justice or public officers to act upon it, is an objection on the merits, and, therefore, that we must consider the objection.

It appears that those documents were executed in the Island of Bombay, where at that time there was not any stamp law in force, and we cannot say that they were originally expressly intended to operate within any of the zillahs subordinate to the Presidency of Bombay so as to bring them within the scope of Regulation XVIII. of 1827. The Regulation, being an enactment imposing stamp duties upon the subject, must be strictly construed (*k*), and although we fully believe that those documents were actually intended to operate, so far as the property now in dispute is concerned, in the zillah of Tanna, we cannot hold "expressly" to mean the same as "actually." There is nothing on the face of either of the exhibits 9 and 10 to show where the property mentioned in them was situated. It is quite possible, nay more, it would seem to be certain, that Morobá, the father of the defendants Bhagvantráv and Ganpatráv, left property in the Island of Bombay as well as in Tanna Zillah. Those documents show that letters of administration of his separate property had been granted to the defendant Bhágirthibái, his widow, and the two exhibits 9 and 10 seem to have been intended to operate on that property as well as on the Tanna property. But, it not appearing *expressly* on either of those exhibits that they were intended to operate in Tanna Zillah, we cannot regard them either as invalidated or inadmissible for want of a stamp.

There remains the objection that the Assistant Judge declined to regard the suit instituted on the 24th January 1856, in

(*k*) See the authorities collected in *Dullabh Shivlal* v. *Hope*, 8 Bom. H. C. Rep. 216, 217, A.C.J.

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which a decree (Exhibit 72) was made on the 8th December 1856, as relevant evidence in this cause. On this point we are of opinion that the Assistant Judge fell into a serious error; so far as we can conjecture, he would appear to have been misled by an imperfect recollection of Section 2 of Act VIII. of 1859 and of its scope. We are of opinion that in order to test the *bona fides*, with which Bhagvantráv executed the exhibits 9 and 10, it was most important to ascertain how Bhagvantráv subsequently demeaned himself with regard to the property, his share or interest in which he thereby purported to convey. If, notwithstanding those conveyances, he still took an active part in managing or interfering with or using or suing for any part of the property affected by either of those deeds (9 and 10), such conduct, if not resisted by his mother or brother, Ganpatráv, would tend to show that those exhibits were illusory, and merely intended to screen Bhagvantráv's share from executions by his creditors. Therefore, proceedings in courts of justice, taken by Bhagvantráv jointly with Ganpatráv, would be important evidence which the Assistant Judge should have weighed in connexion with the other circumstances of the case. He has evidently thought that he was not bound to take such circumstances into his consideration, and we must, therefore, remand the suit for a fresh trial on the merits. On such trial, it will be necessary that the Assistant Judge should place in one scale the exhibits 9 and 10, and all circumstances which tend to show that they were executed and acted on *bonâ fide* by both brothers, as, for instance, that they gave up, under Exhibit No. 10, possession or enjoyment of a third share in the property, mentioned in that exhibit, to their mother Bhágirthibái; or as to Exhibit No. 9 that Bhagvantráv gave up complete or at all events substantial possession of his one-third of the property covered by it to Ganpatráv and Bhágirthibái; and the Assistant Judge should place in the other scale the fact, not perhaps conclusive, if it be the fact, that the property or a considerable portion of it stood in the Government Books in the name of Bhagvantráv until a comparatively recent period, and any circumstances, such as those referred to by the Sub-

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ordinate Judge, or evidence tending to show that he sued for or enjoyed partially or wholly his one-third share, or exercised control over it or managed and exercised control over the property at large subsequently to the execution of exhibits 9 and 10.

This Court does not intend by these remarks in anywise to express an opinion as to the merits of the case, but merely desires to show what the process of investigation should be.

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[APPELLATE CRIMINAL JURISDICTION.]

## REG. *v.* BALVANT V. PENDHA'RKAR.

July 9.

*Acquittal by Jury—Conviction by High Court—Confession—Sec. 24 of Act I. of 1872—Section 263 of the Code of Criminal Procedure.*

In the absence of evidence that a confession of an accused person has been induced by illegal pressure, it is not to be presumed that such confession was so induced.

According to Section 24 of the Indian Evidence Act, a confession is inadmissible only if the Court considers it to have been induced by illegal pressure. Where the Session Judge did not consider a confession to have been so induced, the High Court, upon a reference under Section 263 of the Code of Criminal Procedure: *Held* it to have been properly admitted, and finding it to be full and clear, and supported by reliable evidence, acted upon it by convicting the person who made it, notwithstanding his retraction of it in the Court of Session, and his being found not guilty by the Jury.

THE accused was tried on a charge of forgery by N. Daniell, Session Judge of Poona, and a Jury. The majority of the Jury were of opinion that the accused should be acquitted; but the Session Judge, differing from them, submitted the proceedings under Section 263 of the Code of Criminal Procedure.

The case was heard by NA'NA'BHA'I HARIDA's and LARPENT, JJ.

*Dhirajlál Mathurádás*, Government Pleader, for the Crown:—There is no question that the bills presented by the accused have been altered. The accused made a full confession of his guilt before the Magistrate, although he afterwards retracted it in the Session Court, on the ground of its having

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been made under unlawful pressure. There is nothing to show there was any such pressure, and the Court of Session, which had to consider it, believes the confession to have been voluntarily made. There is, besides, ample evidence in the case to establish the guilt of the prisoner; and though this case is tried by a Jury, the High Court can go into the facts as in an ordinary appeal: Section 263 of the Code of Criminal Procedure.

*Pándurang Balibhadra* for the accused.

NA'NA'BHA'I HARIDA'S, J., in delivering judgment, said:—This appears to us to be a very clear case. The accused, when examined before the committing Magistrate, made a clear and full confession—a confession which was in every way borne out by the evidence of witnesses called for the prosecution. It occurred to the accused for the first time, when before the Session Court, to allege that that confession was the result of threats and hopes held out to him by every body connected with the Municipality. If a statement in confession of crime is the result of any such influences, there can be no doubt that it is utterly inadmissible; but, in the absence of evidence, it is not to be presumed that a statement objected to on the ground of its having been induced by illegal pressure is inadmissible. Section 24 of the Evidence Act says that a statement is inadmissible only if the Court considers it to have been made in consequence of "any inducement, threat or promise"; and so far as the record of this case goes, we can discover no evidence whatever of any such influence having been used. And we also find the Session Judge expressing his opinion that there was no reason to doubt the truth of that confession, or to think that it was made under any unlawful pressure. That being the case, we cannot but hold that the confession was properly admitted; and we do not see any reason to disbelieve any part of it. We are reluctant generally to differ from any opinion the Jury, or a majority of them, may arrive at; but in a clear case like this we cannot accept the view of the Jury (which we may further remark was not unanimous) in pre-

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ference to the confession of the prisoner. We are thus compelled to find the accused guilty of the charges, viz., that he committed forgery of two documents, authorizing him to recover Municipal taxes, and we pass upon him a sentence of two years' rigorous imprisonment.

*Order accordingly.*

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[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No.* 36 *of* 1874.

July 9.

RA'VJI NA'RA'YAN.....*Appellant.*

KRISHNA'JI LAKSHMAN.....*Respondent.*

*Rights of a previous mortgagee—Sale, pendente lite.*

On the 31st August 1863, *A* mortgaged his house to *B*, who brought a foreclosure suit, and, on the 7th July 1866, obtained a decree against *A* for the sale of the house, if the mortgage debt was not paid on or before the 24th March 1868. The debt not having been paid, the house was sold at a Court's sale on the 15th July 1870, and purchased by *C*. In an action brought by the plaintiff to recover possession of the house on the ground that he had purchased it on the 2nd August 1868 at an execution sale under a common money decree against *A*:

*Held* that the plaintiff's sale was subject, not only to the mortgage of 1863, but also to the decree upon it under which the right, title, and interest of the mortgagor *A*, passed in 1870 to *C*, whose purchase was entitled to preference to the plaintiff's purchase in 1868.

*Held*, further, that if there had been no decree in the mortgage suit, the fact that that suit had been instituted in 1866, and was pending in 1868, would have been sufficient to defeat the plaintiff's suit; his purchase in 1868 having been made *pendente lite*, was completely subject to any decree which might be made in the mortgage suit.

THIS was a special appeal from the decision of E. T. Candy, Assistant Judge at Satara, reversing the decree of Rámchandra Apáji, Subordinate Judge at Walwa, in the District of Satara.

The special appeal was argued before WESTROPP, C.J., and WEST, J., on the 9th July 1874.

*Ganpatráv Bháskar* for the appellant.

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*Vishnu Ghanashám*, for the respondent, objected that the present special appeal, having been preferred by the mortgagee Rávji Náráyan, and not by the execution-purchaser, Rango Náráyan, could not be maintained, because Rávji had no interest whatever in the property, the same having absolutely passed to the execution-purchaser, Rango, who, however, did not choose to appear in the special appeal. Rango alone was entitled to maintain the present appeal : *Khevráj* v. *Lingayá* (*a*) and *Sheshgiri Shánbog* v. *Salvador Vas* (*b*).

The facts of the case fully appear from the following judgment delivered by

WESTROPP, C.J. :—In this case, the plaintiff, as purchaser of a house at a judicial sale, made to him on the 2nd of August 1868 under a common money-decree in a suit, brought by one Rámchandra against Náná, the original owner of the house, sued the defendants Rávji Náráyan and Rango Náráyan to recover possession of the house, of which possession the plaintiff alleged that those defendants, colluding with Náná, had deprived the plaintiff.

It appears that Náná, on the 31st August 1863, mortgaged the house to Rávji Náráyan, who, in 1866, brought against Náná a suit for foreclosure and sale in satisfaction of the money due on the mortgage, and, on the 7th of July 1866, obtained a decree in that suit for sale of the house, if the whole of the money due was not paid on or before the last day of Phálgun, Shake 1789 (24th March 1868). The money not having been paid, the house was, pursuant to that decree, sold, upon the 15th July 1870, to the defendant Rango Náráyan.

The Subordinate Judge in the present suit held that the plaintiff never had possession, and that the defendant Rango's title, being founded on that of the mortgagee Rávji, which was prior to that of the plaintiff (who could only have pur-

(*a*) S. A. No. 208 of 1873, decided by WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J., 29th July 1873.

(*b*) S. A. No. 460 of 1872, decided by WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J., 4th August 1873.

chased the equity of redemption which remained in Náná, the mortgagor), was preferable to that of the plaintiff, and the Subordinate Judge accordingly made a decree for the defendants with costs.

The plaintiff appealed on the ground that Rávji had no right to cause the house to be sold without a previous demand by him from the plaintiff of the moneys due on the mortgage. The Assistant Judge, Mr. Candy, having laid down as the issue to be determined the question "whether the plaintiff is entitled to possession of the house," held that he was, and reversed with costs the decree of the Subordinate Judge. The Assistant Judge, while admitting that the plaintiff, by his purchase in 1868, must be regarded as buying subject to Rávji's mortgage lien, which dated so far back as 1863, assigned as his reason for reversing the decree of the Court of first instance, that, after the sale to the plaintiff in 1868, Náná had no right, title, or interest in the house, and, therefore, that, in purchasing that right, title, and interest in 1870, the defendant Rango took nothing. The Assistant Judge said—"How can he have possession of that in which Náná had no title? Therefore the plaintiff, who holds a registered certificate of sale of 1868, whereby he purchased all Náná's rights, has a far better claim to possession than Rango, who purchased in 1870 that which was not in existence. Of course, the original mistake was in Rávji not demanding in 1870 the mortgage-money from the plaintiff, who stood in Náná's place." This Court cannot avoid observing that the reasoning of the Assistant Judge was unsound, and that his award of possession of the house to the plaintiff is, in every possible point of view, completely unsustainable. Assuming for a moment that the Assistant Judge was right in holding that the defendant Rango took nothing by his purchase in 1870, that circumstance would not have entitled the plaintiff to possession. If the estate and interest of the mortgagee Rávji had not passed by the sale in 1870 to Rango, it still remained vested in Rávji, who was a defendant in the suit, and would have had a better

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title, as mortgagee, to possession than the plaintiff, who, at the utmost, was only the purchaser of Náná's equity of redemption. Even if Rávji had not been a party to the suit, it would have been a sufficient answer to the plaintiff's suit for possession for Rango to show that the preferable title to possession was outstanding in Rávji or in any stranger. The plaintiff could only have obtained possession on the strength of his own title, and not on the weakness of that of Rango; and the utmost relief that, on the hypothesis of Rango not having taken anything by his purchase, the Assistant Judge could have properly awarded to the plaintiff, would have been that, by paying to Rávji the amount due on his mortgage the plaintiff should be at liberty to redeem the house. But in fact Rango's title, so far from being weak, was perfectly good as against the plaintiff. That Rávji's mortgage was a valid lien on the house is not disputed by the Assistant Judge. Rávji not only had instituted his suit for foreclosure and sale under that mortgage, but had also obtained a decree to that effect in July 1866, *i.e.*, two years before the sale to the plaintiff in August 1868. The sale, directed by that decree in the event of non-payment of the moneys due on the mortgage, could not, under the terms of the decree, take place before the 24th March 1868. It did not in fact take place until 1870, but, in the meantime, the plaintiff purchased under Rámchandra's common money-decree in 1868. That purchase was subject as well to the mortgage as to the decree founded upon it (such decree being an affirmance of Rávji's mortgage-lien), and, as was observed in this Court in *Khevráj* v. *Lingayá* (*ubi supra*), although it is not the practice of the mofussil courts to require a mortgagee, who sues for and obtains a sale of the mortgaged premises, formally to convey to the purchaser, and the latter must be contented with a certificate of sale to him of the right, title, and interest of the mortgagor, yet in fact the interest of the mortgagee, who causes the sale to be made, is held to pass to the purchaser, and that mortgagee is completely estopped from disputing that such is the effect of the sale." See to the same effect (viz., that the transfer takes place by way of estoppel,) *Kasan-*

*dás* v. *Pránjivan* (*c*) and *Sheshgiri Shánbog* v. *Salvador Vas* (*ubi supra*). The estate and interest of Rávji, which was paramount to that of Náná, passed to Rango by the sale in 1870, and the plaintiff's purchase being subject not only to the mortgage, but also to the decree upon it, which decree directed a sale, the right, title, and interest of Náná passed to Rango by the sale in 1870; and that sale is entitled to preference to the sale in 1868 to the plaintiff.

But further, if there had not been any decree in the mortgage suit, the mere fact that that suit, which had been instituted in 1866, was pending in 1868, would have in itself been sufficient to defeat the plaintiff's present suit. His purchase in 1868, having been made *pendente lite*, was completely subject to any decree which might be made in the mortgage suit: *Báláji Ganesh Apte* v. *Khushálji Bahiroji* (*d*), *Gulábchánd Mánikchand* v. *Dhondi Bháu* (*e*), *Bellamy* v. *Sabine* (*f*), *Tryé* v. *The Earl of Aldborough* (*g*), *Manual Fruva* v. *Sanagapálli Latchmidevamma* (*h*), *Kásim Shaw* v. *Unnoldapersaud Chatterjee* (*i*), and see *Umamoyi Burmoneea* v. *Tarini Prasad Ghose* (*j*), *Hunoomon Doss* v. *Koomeroonnissa Begum* (*k*). Rávji, therefore, made no mistake, and was not bound to take any notice of the plaintiff's purchase, or to ask him to redeem, that purchase having been made *pendente lite*. For these reasons, this Court reverses the decree of the Assistant Judge, restores that of the Subordinate Judge, and directs the plaintiff to pay the costs of the suit and of both appeals.

We ought, perhaps, to notice the objection made on behalf of the respondent, the plaintiff, by his pleader, that Rávji, who alone of the two defendants has appealed, not having any interest in the premises in dispute, cannot maintain this special appeal. But on our observing that, at the least, Rávji had been improperly charged with costs, and to that

(*c*) 7 Bom. H. C. R. 146 A. C. J. (*d*) *Supra* p. 24.
" (*e*) *Supra* p. 64.
(*f*) 1 De Gex and Jones 566; S. C. 26 L. J. Ch. 797. N. S.
(*g*) 1 Ir. Ch. Rep. 666. (*h*) 7 Mad. H. C. R. 104.
(*i*) 1 Hyde 160. (*j*) 7 Calc. W. R. 225 Civ. Rul.
(*k*) Calc. W. R. F. B. Rul. 1862—1864-40.

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extent had an interest in appealing, and had been treated by the plaintiff, who had made him a party-defendant to the suit, as having an interest, and further that, if it were necessary, this Court was prepared to adjourn the hearing in order to permit Rango (who most probably had purchased as a trustee for Rávji) to be made a party to the appeal as co-appellant, the respondent's pleader declined to persist in his objection.

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[APPELLATE CRIMINAL JURISDICTION.]

July 30.

REG. v. CHOUTHMAL LACHHIRA'M.

*Cotton Frauds (Bombay) Act IX. of* 1863, *Sec.* 2.

Ginning together two varieties of cotton which had been mixed before constitutes "mixing" within the meaning of Section 2 of Bombay Act IX. of 1863.

THIS was an application for the exercise of this Court's extraordinary jurisdiction. The accused was convicted by the Second Class Magistrate of Khandesh of dishonestly mixing cotton of two different varieties in one bale, and sentenced to suffer one months' rigorous imprisonment and pay a fine of Rs. 150. In appeal this sentence was enhanced to two months and a fine of Rs. 300.

The application was heard by WEST and NA'NA'BHA'I, JJ.

*Shántárám Nárayan* for the applicant.

*Dhirajlál Mathurádás*, Government Pleader, for the Crown.

The facts appear sufficiently from the following judgment delivered by

WEST, J. :—The accused has been convicted of the offence of mixing dishonestly two different varieties of cotton in one bale; and the only question for decision, which requires any serious remarks, is whether the accused is found to have done any act which constitutes a "mixing" within the meaning of Bombay Act IX. of 1863, Section 2. Mixing, like adulteration, admits of almost infinite degrees, and if, after a partial mixing operation by one person, there

is a further mixing by another, the latter is responsible as well as the former, although, had the several acts been all done by one and the same hand, they would have coalesced so as to form but a single offence. This seems to be the true ground on which to put such cases as *Crepps* v. *Durden* (*a*), but it does not affect the liability of each of several successive offenders against the same law.

It has been contended that the mixing here was not carried out by the accused, but had been so effected before the cotton came into his hands. He cleaned it, it is said, as it came to him, but this was not "mixing." We are of a different opinion. Ginning the two varieties together was mixing them more intimately than before, and so indeed as to be practically inseparable, which before they were not.

If each of several persons through whose hands a quantity of Hinganghat cotton passes, adds Varadi cotton to it, each infringes the law by mixing different varieties in one bale. And similarly, notwithstanding a previous rough mixture, the cotton dealer, by ginning two varieties together, blends them more closely, and thus commits an additional act directly against the direction of the law.

It seems admitted that cotton of different varieties ginned together was put into one bale. Thus the physical act required under the Act was completed. As to the question of intention, the Magistrate has recorded a distinct finding against the accused. He has found that he intended to sell the cotton as cotton of higher quality. We are unable to say that the finding is not supported by evidence. We must, therefore, uphold the conviction.

As to the punishment also, we think it is not excessive. The offence found proved is of graver moment than an ordinary fraud, as the Legislature has thought fit to provide against it specially, and when established it must be visited with an appropriate penalty. The conviction and sentence will, therefore, stand unaltered.

*Petition rejected.*

(*a*) 1 Smith L. C. 666.

1874.
August 13.

## [APPELLATE CRIMINAL JURISDICTION.]

REG. *v.* KA'LU PA'TIL and another.

*Indian Evidence Act I. of 1872, Sec. 30—Confession—"Jointly Tried"—Discrepancies in evidence.*

A prisoner who pleads guilty at the trial, and is thereupon convicted and sentenced, cannot be said to be jointly tried with the other prisoners, committed on the same charge, who plead not guilty. Where, therefore, one of eight prisoners before the committing Magistrate made a confession affecting himself and five others, and afterwards, at the trial before the Assistant Session Judge, pleaded guilty, and was thereupon convicted and sentenced, and the Judge then proceeded to take his evidence on solemn affirmation, and recorded his confession as evidence in the case against the other prisoners; *Held* that the Judge was wrong in taking the confession into consideration against those prisoners who pleaded not guilty. The proper course for the Judge was either to have sentenced the prisoner who pleaded guilty, and then put him aside, or to have waited to see what the evidence would disclose.

Discrepancies are not less infirmative of testimony, because a greater sagacity on the part of witnesses would have avoided them.

THE prisoner, Kálu Pátel, and seven others were tried by W. H. Crowe, Assistant Session Judge at Tanna, on a charge of dacoity, under Section 395 of the Indian Penal Code. One of the prisoners, Nausiá, who had made a confession before the committing Magistrate, affecting himself and five other of the prisoners, pleaded guilty, and was accordingly convicted and sentenced to suffer rigorous imprisonment for four years. After Nausiá had been convicted on his own plea of guilty, and sentenced to punishment, he was still kept with the other prisoners till the conclusion of the trial, but the Assistant Session Judge examined him as a witness for the prosecution, and recorded his confession as evidence in the case. On that confession, with the other evidence in the case, the Assistant Session Judge convicted the five prisoners, whom the confession affected, and acquitted the remaining two, who were not affected by it. The Assistant Session Judge's reasons appear from the following extract from his findings:—

"The point for determination is whether the five accused persons, or any of them, did commit the dacoity in question. My finding is that the five accused persons did commit dacoity.

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"The evidence in this case consists of the depositions of witnesses Nos. 1, 2, and 3, and the admission made by one of the accused, Nausiá, who was convicted on his own plea of guilty, before the Magistrate (No. 7). The three witnesses (Nos. 1, 2, and 3) are unanimous in saying that one and all of the accused were present at the dacoity, which took place at the house of Vithu, (No. 1) in the month of Jyesht last. One only of the witnesses, Káshirám Teli (No. 2), states that he knew all the prisoners before the time of the robbery, and this is admitted by some of them in their examination. This witness states that he knew the accused 7 or 8 years before the robbery, and he is confident that the accused are the persons who committed it. I see no reason for doubting the veracity of this witness. I can see no possible motive he can have for falsely accusing eight men of a grave crime of this nature. There is another important piece of evidence in the case, namely, the confession of the accused Nausiá before the committing Magistrate, which affects all of the present accused, and may, by Section 30 of the Evidence Act, be taken into consideration against them. This man Nausiá fully admits his guilt, and states clearly that all of the accused were with him except Muniá (No. 2) and Mahádu (No. 4). This statement corroborates that of the other witnesses as regards all of the present accused, and, as such, is entitled to consideration. From the whole of the evidence I consider the offence fully proved against the prisoners. I do not place much reliance on the evidence of witnesses Nos. 1 and 3, as I consider it improbable that they would be able from one interview, a year ago, to remember distinctly the faces of eight persons so as to identify them. The statement of Káshirám (No. 2), however, is not open to any such objection."

Two of the five prisoners, Káliá and Janiá, appealed to the High Court against the conviction and sentence passed by the Assistant Session Judge. The appeal was argued before WEST and NA'NA'BHA'I HARIDAS, JJ., on the 13th August 1874.

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*Vishnu Ghanashám* for the prisoners:—When the Assistant Session Judge recorded Nausiá's confession as evidence against the other prisoners, Nausiá was not on his trial jointly with them, as required by Section 30 of the Evidence Act. His trial was then at an end, as he had been convicted, and sentence had been passed on him. The confession, therefore, was no evidence against the other prisoners. The learned pleader then commented at length on the discrepancies in the evidence.

*Dhirajlál Mathurádás* (Government Pleader) in support of the conviction:—According to the interpretation of the word "trial" in the Criminal Procedure Code, whatever takes place subsequent to the reading of the charge, is part of the trial. As a matter of fact, Nausiá was with the other prisoners when his confession was admitted as evidence against them. As regards the discrepancies, their existence shows that the witnesses were not tutored. Besides, they gave their evidence one year after the occurrence of the offence.

PER CURIAM:—We are of opinion that the examination of Nausiá was wrongly admitted as evidence in this case. After Nausiá had pleaded guilty, and had been convicted and sentenced to punishment, and his evidence had then been taken on solemn affirmation as a witness, he could not any longer be considered as one jointly tried with the others, when the Assistant Judge, in framing his judgment, took his evidence into consideration. On Nausiá's pleading guilty, he should have been sentenced and put aside, or the Assistant Judge, without immediately passing sentence, ought to have waited to see what the evidence disclosed. The course adopted by the Assistant Judge of keeping him as a prisoner with the rest, with the object of taking his statement into consideration under Section 30 of the Evidence Act, cannot be approved. Rejecting that piece of evidence, what is left is the evidence of three witnesses, Vithu, Káshirám, and Dharmá. It seems to be an improbable circumstance that these persons should not have promptly denounced the prisoners. Vithu knew Hari, one of the prisoners, and Káshi-

rám knew all of them. This omission on the part of the witnesses throws a doubt on their credibility. Then there are the discrepancies which Mr. Vishnu Ghanashám has pointed out to us as to the identity of the prisoners, the place where the stolen money was handed over, and other matters which should also be taken into consideration. No doubt, it may be contended, that if these witnesses were tutored ones, care would have been taken to see that they should tell the same story. But care is not always taken, or effectually taken, in such cases, and discrepancies are not less infirmative of testimony, because a greater sagacity on the part of the witnesses would have avoided them. In the face of those which occur in this case, it would not be safe to convict the prisoners, and we accordingly direct that the convictions and sentences be reversed.

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*Conviction and sentence reversed.*

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[APPELLATE CIVIL JURISDICTION.]

August 17.

*Special Appeal No.* 363 *of* 1872.

VA'SUDEV MORESHVAR GUNPULE..... *Appellant.*

RA'MA' BA'BA'JI DA'NGE ..... *Respondent.*

*Registration Act XX. of* 1866—*Consideration—Optional registration.*

The consideration mentioned in a deed of sale by the parties thereto must be regarded as showing the value of the interest conveyed for the purposes of registration under Act XX. of 1866. *Rohinee Debia* v. *Shib Ghunder Chaterjee* (15 Calc. W. R. Civ. Rul. 558) followed.

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge at Ratnagiri, affirming the decree of Gopál Amrit, Subordinate Judge at Chiplun.

The plaintiff, Vásudev Moreshvar, brought this suit to recover possession of a shop with the ground underneath it, and based his claim to the property on a deed of sale executed to him by one Govind Pándurang Sett, under date the 24th November 1869. The deed recited that the property in dispute had been mortgaged to the said Govind Pándurang for Rs. 118-12-0, and that the mortgagee sold his rights

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therein to the plaintiff for Rs. 80.' The Subordinate Judge threw out the claim, on the ground that the plaintiff failed to prove it. In appeal, Mr. Parsons upheld that decree on the following preliminary ground :—

"I raise of my own motion the following preliminary issue :

"Must the deed of sale be registered ?

"I think that the deed must be registered. The deed of sale, dated November 24th, 1869, purports to convey the rights obtained under the mortgage-deed from Sett to the appellant : the value of the mortgage-deed is Rs. 118-12-0. The deed of sale, therefore, assigns to the appellant a right, title, and interest of the value of upwards of Rs. 100 in immoveable property, since it assigns this mortgage-deed. It is true that the stamp of the deed is only of the value of one rupee, but the Act of 1866 does not contain the same provision as does Act XVI. of 1864 in its 14th section, and the Calcutta High Court have ruled that this section even is only applicable when there is in the deed no declaration of value : *Ishan Chandra* v. *Sujan Bibi* (*a*). In this deed there is a declaration that the mortgage-deed for Rs. 118-12-0 is conveyed to the appellant. There being then created by this deed an assignment of an interest of the value of more than Rs. 100 in immoveable property, registration is compulsory ; and since the deed has not been registered, it cannot be received in evidence, and as the fact of sale cannot be proved except by its production the appellant cannot prove his title at all. I must, therefore, on this ground hold that the appellant has not proved his title. I confirm the decree with costs."

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J., on the 17th August 1874.

*Vishnu Ghanashám* for the appellant :—As the consideration expressly stated in the deed of sale did not exceed Rs. 100, the registration of that document was not compulsory under Act XX. of 1866, section 17. It is such expressly

(*a*) 7 Beng. L. R. 14 Per Mookerjee, J., p. 18.

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stated consideration that determines whether a writing does or does not require registration: *Rohinee Debia* v. *Shib Chunder Chaterjee* (*b*).

*Ganesh Hari Patvardhan* for the respondent.

PER CURIAM:—The Court concurs in the decision in *Rohinee Debia* v. *Shib Chunder Chaterjee*, and is accordingly of opinion that the consideration in the deed of sale, viz., Rs. 80, fixed by the parties thereto, must be regarded as showing the value for the purposes of registration under Act XX. of 1866, which was that applicable to the deed of sale dated 24th November 1869. The registration of that deed, therefore, was optional. This Court reverses the decree of the Assistant Judge, and remands this cause for retrial by him on the merits. Costs throughout to follow the result of the new trial.

*Decree reversed and Case remanded.*

[APPELLATE CIVIL JURISDICTION.]

*Application for Extraordinary Jurisdiction.*

August.

*No.* 32 *of* 1874.

GAMBHIRMAL and BA'NA'CHAND .....*Appellants.*

CHEJMAL JODHMAL and others .....*Opponents.*

*Appeal—Code of Civil Procedure, Secs.* 209 *and* 364—*Act XXIII. of* 1861, *Sec.* 11—*Extraordinary Jurisdiction—Decree—Stay of execution.*

No appeal lies against an order, under the last clause of Section 209 of the Code of Civil Procedure, staying the execution of a decree. The High Court, however, in the exercise of its extraordinary jurisdiction, will examine the judicial propriety of such an order.

Where a Subordinate Judge, in consequence of a fresh suit by the plaintiff, stayed the execution of a decree which was passed in the defendant's favour for costs, the High Court, in exercise of its extraordinary jurisdiction, reversed the stay order.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction.

One Gambhirmal obtained a decree against Chejmal and others, which was reversed in appeal, and a decree was

(*b*) 15 Calc. W. R. Civ. Rul. 558.

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given in favour of the latter for costs. This decree was purchased by Bánáchand, who applied for its execution, and a warrant was issued for that purpose. But a second suit against Chejmal and others having been instituted by Gambhirmal for the same subject-matter, upon a different cause of action, the warrant for execution was recalled, and a stay order issued under Section 209 of the Code of Civil Procedure.

Against this order an appeal was made to the District Judge, Mr. Bosanquet, who entertained the same, and reversed the order, on the ground that the second suit not having been instituted against Bánáchand, who was now the holder of the decree against Chejmal and others, Section 209 of the Code did not authorize the Subordinate Judge to issue the stop order.

Against this order of the District Judge, this application was presented to the High Court.

It was first heard by PINHEY and NA'NA'BHA'I, JJ., on the 27th of April 1874, and a rule issued in the following words :—

"As no appeal lay to the District Court against an order passed by the First Class Subordinate Court under Section 209 of the Code of Civil Procedure, the Court must, under Section 35 of Act XXIII. of 1861, issue a rule *nisi* to the other side, to show cause why the order of the District Court of Ahmednagar in this case, dated 1st April 1874, should not be set aside and direct stay of execution of the said order of the District Court, upon the applicants giving security in the District Court for the due performance of the final orders of this Court."

At the argument of the rule on August 17th before WEST and NA'NA'BHA'I HARIDA'S, JJ.—

*Pándurang Balibhadra* showed cause :—The order of the Subordinate Court was not under Section 209 of the Civil Procedure Code, as that contemplates a suit against a decree-holder. The very comprehensive words added by Section 11 of Act XXIII. of 1861 to the repealed Section 283 of the

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Code, allows such an appeal as the District Judge entertained in this matter. Even if an appeal does not lie the order of the Subordinate Judge is manifestly improper and should be set aside by this Court.

*Bahiravnáth Mangesh*, in support of the rule:—The general words of Section 11 of the amending Act should not be considered as set aside by the specific words of Section 209, and should be taken as limited by the words which precede them in the section itself.

WEST, J.:—We are of opinion that an appeal to the District Court did not lie in this case. It has been urged that as Section 11 of Act XXIII. of 1861 applies not only to the particular cases specified therein, but to "any other questions arising between the parties to the suit, in which the decree was passed, and relating to the execution of the decree," the order made by the Subordinate Judge in the present case was one falling within that enactment, and, therefore, open to appeal. But a strictly literal interpretation of the words we have quoted, would exclude Bánáchand from the operation of the section, as not having been a party to the suit, and on the ordinary principles of interpretation, the enumeration of particulars in the beginning of the section is to be taken as a guide to the intention of the legislature in using the more general words, which follow, as in the cases of *Re Royal Liver Friendly Society*, (*a*) and *Duke of Buccleuch* v. *Metropolitan Board of Works*, (*b*). That the section is not intended to be applied, in its greatest possible latitude, to every case of a question in any way relating to the execution of a decree, is plain from the cases of *Gulawad* v. *Rahimtulla* (*c*) and *Goono Monee Dossia* v. *Prán Kishore Dossee* (*d*). We think that, regard being had to the purpose of the section and its place in the general scheme of the Procedure Code, it does not override the operation of Section 364, taken with Section 209 of Act VIII. of 1859. These

(*a*) L. R. 5 Ex. 78 Per Kelly, C. B., p. 80.
(*b*) *Id. Ib.* 221. Per Blackburn, J., p. 241.
(*c*) 4 Bom. H. C. Rep. A. C. J. 76.
(*d*) 13 Calc. W. R. F. B. 69.

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two provisions were made law at the same time, and the subsequently enacted law of 1861, intended mainly to prevent the operation of Section 283 of the Code from being evaded or perverted, does not, by any necessary implication, repeal the more specific provision, already made for the particular case, which we have now to consider (Dwarris on St. 668, 533). Thus the order, made by the Subordinate Judge, was not subject to appeal, and the District Judge's order of reversal must itself be reversed.

But it is open to us, on the present application, to examine the judicial propriety of the order, made by the Subordinate Judge, and we are of opinion that, from that point of view, it cannot be sustained. The decree was one for costs incurred by a defendant in successfully resisting the plaintiff's claim in an original suit, regular appeal and special appeal. The defendant was in such a case entitled to an immediate recoupment of his expenses and ought not to be deprived of it by the plaintiff's filing another suit against him, perhaps as groundless as the former one. If such a proceeding were recognized as a proper ground for suspending execution for costs, a rich man could, by a series of suits, in almost every case, wear out the slender means of a poor one. It was not intended that the Code of Procedure should be used so as thus to become a possible means of injustice and oppression. We are not to be understood as expressing any opinion on the character of the particular suit now instituted by the former plaintiff against the former defendant, but, on general principles, we think the Subordinate Judge's order was not a proper one, and we must set it aside. Each party to bear his own costs throughout in this proceeding.

*Order accordingly.*

1874.
August 18.

[APPELLATE CIVIL JURISDICTION.]

*Civil Referred Case.*

NAVALMAL GAMBHIRMAL ..... *Plaintiff.*

DHONDIBA' BIN BHAGVANTRA'V and another.. *Defendants.*

*Limitation Act IX. of* 1871, *Schedule II., Article* 75, *and Section* 23—*Bond payable by instalments—Waiver of default.*

A bond dated the 23rd August 1870, stipulated payment of Rs. 39 for principal and Rs. 9-12-0 for interest, making in all Rs. 48-12, by monthly instalments of Rs. 1-8-0, with the conditions, 1st, that in default of payment of a monthly instalment interest should be paid at 1½ per cent. per mensem till the whole amount was paid, and 2nd, that in default of payment of any two of the monthly instalments, the whole of the principal should become payable at once, exclusive of interest, from the date of the bond. Two instalments being overdue on the 24th October 1870, the whole principal became payable at once. In an action brought by the obligee on the 4th June 1874 for the recovery of the money :

*Held* that the claim was wholly barred, as the first condition amounted only to a proviso that the obligee might exercise a right of waiver and accept payment by instalments instead of suing for the whole, and there was nothing to show that he had exercised such right of waiver.

CURSETJI MANICKJI, Judge of the Small Cause Court at Ahmednagar, referred this case for the opinion of the High Court with the following statement :—

" On the 4th June last the plaintiff in this suit presented to this Court a plaint for the sum of Rs. 40-0-0, alleged to be due on a bond passed to him by the defendants on the 23rd of August 1870.

" The wording of this bond is peculiar, though by no means uncommon in this part of the country, and as a diversity of opinion seems to have prevailed among the former Judges of this Court, as to the right construction of the same, I think it desirable that the question be finally settled by the High Court.

" After mentioning the names of the parties and the date, the bond proceeds in the following words :—

' That we have borrowed from you Rs. 39-0-0 as principal, and allowed Rs. 9-12-0 as *savái* (or interest), in all Rs.

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48-12-0. This sum we agree to pay by monthly instalments of Rs. 1-8-0 from month to month, on receiving a receipt thereof; we will not dispute the payment without receipt.

'1*st Condition.*—In default of the payment of a monthly instalment we agree to pay interest at Rs. 1-8 per cent. per mensem till the whole amount is paid.

'2*nd Condition.*—Or in the course of payment of the whole debt, if we fail to pay any two monthly instalments, we promise to pay the whole amount, viz., Rs. 39-0-0, exclusive of (*savái*) interest, at the rate above stated from the date of the bond then and there.

'We will not raise objection for *savái*, or payment by monthly instalments, but whatever payment is made will be deducted according to receipts.' Then follow two important clauses :—

'For the satisfaction of the bond we bind ourselves by the aforesaid two conditions.

'Satisfaction will be made in accordance with any one of the aforesaid two conditions in which way you may prefer to have the bond satisfied.'

" Thus your Lordships will perceive that the bond is made payable in a two-fold manner at the option of the creditor. He may either, on defendants' failing to pay any two instalments, proceed against them for the whole amount at once under condition No. 2, or he may proceed against them for the instalments, under condition No. 1.

" The defendants have made a default in paying any of the instalments. Consequently, as the bond is dated the 23rd August 1870, the plantiff's right to sue on the whole amount accrued on the 24th October 1870. But as he has not presented his plaint till the 4th of this month, his right to sue the defendants under condition No. 2 of the bond is barred by the Law of the Limitation of Suits : *Nárávanáppá bin Appá Hegde* v. *Bháskar Parmayá* (*a*) and No. 75, Schedule II., Act IX. of 1871.

(*a*) 7 Bom. H. C. Rep. A. C. J. 125.

"The question now arises whether the plaintiff, being time-barred from suing the defendants under condition No. 2 of the bond, can bring a suit against them under condition No. 1 of the same.

"I am of opinion that he can do so for such of the instalments as are due and not barred by the Law of Limitation (Bourke's Law of Limitation, 3rd Edition, page 28), and I have accordingly accepted his plaint subject, however, to the opinion of the High Court on this reference.

"I do not see that the bond, as set forth above, and which is clear and express in its terms, restrains the creditor to any one mode of recovering his debt, by clause (f) of the said bond the defendants bind themselves to satisfy the plaintiff's claim in whichever way it is made. Bonds of this nature are common and well-known in this part of the country. Every creditor is at liberty to protect himself in any legitimate manner, and to propose such terms as would ensure his recovering the money he advances. Bonds of the description under consideration appear to me to be reasonable and not likely to work any undue hardship on the debtors.

"I am, therefore, of opinion that the plaintiff in this suit, being barred from proceeding under condition No. 2 of the said bond, is not prevented from proceeding to recover, under condition No. 1, such of the instalments as are not already barred by the Indian Limitation Act of 1871.

"The question, therefore, for your Lordships' decision is, whether, under the circumstances above stated, the plaint in this suit is to be accepted or rejected."

The reference was considered by WESTROPP, C.J., and KEMBALL, J., on the 18th August 1874.

WESTROPP, C.J.:—The High Court is of opinion that, by reason of there being two instalments overdue on the 24th

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October 1870, upon the bond dated the 23rd August 1870, the whole of the principal moneys, Rs. 39, became due under the terms of the bond upon that day. Nothing amounting to a waiver of the right to sue on that day for the whole of the principal appears to have since taken place, as for instance an acceptance by the obligee of payment of one or more instalments so as to bring the case within the exception in item 75 of the 2nd Schedule to Act IX. of 1871. In *Hemp* v. *Garland* (*b*), LORD DENMAN, C.J., said—"If he (the plaintiff) chose to wait till all the instalments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time the plaintiff had a right to maintain it" (see also 7 Bom. H. C. R. 125 A. C. J.). The second portion of Section 23 of Act IX. of 1871 deserves attention. The first part of that section provides that in the case of fresh breaches of contract, there shall be a fresh period of limitation for each breach, but the second part of that section enacts "That nothing in the former part of this section applies to suits for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole becomes due." This is followed up by item 75 in the second Schedule to the Act, which expressly lays down that "on a promissory note or bond payable by instalments, which provides that, if default be made in payment of one instalment, the whole shall be due," the time when the period of limitation begins to run shall be "the time of the first default, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made." The condition in the contract here being that, in default of payment of any two monthly instalments, the whole of the principal, Rs. 39, should become due, and there being no waiver of that condition, this Court is of opinion that time began to run against the plaintiff on the 24th October 1870, and that his suit, not having been instituted until the 4th of June 1874,

(*b*) 4 Q. B. 519 S. C. L. J.; 12 Q. B. 134.

is wholly barred. There is, it is true, a proviso in the bond here that the obligee might waive the right to sue for the whole, and, instead, accept payment by instalments, but that proviso gave him nothing more than the right of waiver which the law gave him, which right, as has been above observed, there is nothing here to show that he exercised.

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[APPELLATE CIVIL JURISDICTION.]

August 24.

*Special Appeal No.* 133 *of* 1874.

BA'LA'JI RA'MCHANDRA.....*Defendant and Appellant.*

GAJA'NAN BA'BA'JI.....*Plaintiff and Respondent.*

*Rights of prior and puisne attaching creditors—Alienation—Attachment—Act VIII. of* 1859, *Sections* 240, 270, 271.

A private alienation of property, while under attachment, is null and void only as regards the attaching creditor and those who claim under or through the attachment. *Anund Lall Doss* v. *Jullodhur Shaw* (17 Calc. W. R Civ. Rul. 313) followed (*a*).

The fact that a puisne attaching creditor mentioned, in his application for attachment and sale of certain property of his judgment-debtor, that the same property had already been attached at the instance of another execution-creditor, does not render the puisne creditor a claimant through the first attaching creditor.

A puisne attaching creditor cannot be regarded as claiming through a prior attaching creditor, though the assignee of an attaching creditor's rights, or the next of kin of a deceased attaching creditor, may be said to claim under or through him.

Act VIII. of 1859, Section 240, is for the benefit of an attaching creditor (subsequent to, and in defiance of, whose attachment, the private alienation, thereby declared void, has been made), and of those claiming under or through him, and not for the benefit of puisne attaching creditors, whose attachment is laid later than such private alienation.

Sections 270 and 271 of the Civil Procedure Code apply only to cases where there has been a sale under the first attachment.

THIS was a special appeal from the decision of E. Hosking, Acting Assistant Judge at Satara, in Appeal No. 13 of 1873, reversing the decree of Amrit Shripat, Subordinate Judge of Karad.

(*a*) See 11 Calc. W. R. App. from O. J. 1.

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BA'LA'JI RA'MCHANDRA v. GAJA'NAN BA'BA'JI.

The facts of the case, so far as they are material to this report, are briefly these :—

A house with its site, the property of one Sitárám Dikshit, was attached by his judgment-creditor Sakhárám Dikshit. Subsequently, on the 12th September 1869, the plaintiff Gajánan purchased the house and site from the said Sitárám Dikshit and another, part of the purchase-money being used by Sitárám in paying his judgment-creditor, Sakhárám Dikshit, the amount of his decree. Sakhárám, consequently, did not deposit money in Court for expenses of the sale. The attachment, therefore, was raised by the Court on the 30th November 1869. On the 16th September 1869, Vásudev Rámchandra, another judgment-creditor of Sitárám, applied for the attachment and sale of the aforesaid house and site. Vásudev stated in his application that the property had already been attached by Sakhárám Dikshit, and prayed that in the event of its sale under the prior attachment, the surplus proceeds might be applied to the satisfaction of his (Vásudev's) own decree. The property, accordingly, was again attached on the 4th July 1870, and purchased by the defendant Báláji Rámchandra at the Court's sale. Gajánan, therefore, brought the present suit to establish his right to the house, after having failed in his attempt to raise, under Section 246 of the Civil Procedure Code, the attachment placed by Vásudev. The defence chiefly was that the sale to the plaintiff was null and void, inasmuch as it was made while the property was under attachmeut. The Subordinate Judge threw out the plaintiff's claim on that ground. But the Assistant Judge in appeal, on the authority of a ruling of the Privy Council referred to in the judgment of the High Court, reversed the decree of the First Court, and, holding the plaintiff's purchase valid, awarded the house to him.

In special appeal it was contended (1) that the sale to the plaintiff, being admittedly made while the property was under attachment, was null and void, and (2) that the decision of the Appellate Court was opposed to the provisions of Sections 240, 270, and 271, of the Civil Procedure Code.

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J., on the 24th August 1874.

*Janárdan Sakhárám Gádgil* for the appellant.

*Bhairavnáth Mangesh* for the respondent.

WESTROPP, C.J :—The Court is of opinion that the Assistant Judge rightly applied the Privy Council decision in *Anund Lall Doss* v. *Jullodhur Shaw* (*b*) to this case. The fact that the puisne attaching creditor (the appellant) mentioned in his *darkhást* of the 16th September 1869, whereby he sought an attachment of the property in dispute, that it was already under attachment by the prior execution-creditor, Sakhárám Dikshit, does not render the puisne creditor a claimant through the first attaching creditor. Moreover, the first attachment was raised on the 30th November 1869 for non-payment, by the first attaching creditor, of the expenses of such sale as might take place under it, so that it was no longer in existence when the appellant's attachment was laid on the property upon the 4th July 1870.

An assignee of an attaching creditor's rights or the next of kin of a deceased attaching creditor may be said to claim under or through the attaching creditor, but we are unable to perceive that a puisne attaching creditor can be regarded as claiming through him. Sections 270 and 271 of the Civil Procedure Code apply only to cases in which there has been a sale under the first attachment. Section 240 is for the benefit of the attaching creditor (subsequent to, and in defiance of, whose attachment the private alienation, thereby declared void, has been made), and of those claiming under or through him, and not for the benefit of puisne attaching creditors, whose attachments are laid on later than such private alienation. The private alienation in the present case having been found to be a *bonâ fide* transaction, and having priority over the appellant's attachment, we affirm the decree of the Assistant Judge with costs.

*Decree affirmed with costs.*

(*b*) 17 Calc. W. R. Civ. Rul. 313.

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[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No.* 26 *of* 1873.

DA'DIBHA'I JAHA'NGIRJI .....*Plaintiff and Appellant.*
RA'MJI BIN BHA'Π and
others.....*Defendants and Respondents.*

*Shilotri lands—Inámdárs—Regulation* I. *of* 1808, *Sec.* 4—*Right of Inámdárs to raise the assessment on Shilotri lands—Prescriptive right of Inámdárs to recover from Shilotridárs the revenue formerly paid by the latter to Government.*

Government, by an indenture dated the 25th January 1819, conveyed to *A* and *B* and their heirs and assigns certain villages in the Island of Salsette, with the exception of such spots of *Shilotri* tenure as might be therein, or on any part thereof, which could only become the property of *A* and *B*, on their purchasing the same from the proprietors. Since 1819, the holders of these *Shilotri* lands had paid to the grantees and their heirs assessment (or rent) at a fixed rate which, before the grant, they used to pay to Government. In an action brought by an heir of *A* and *B* in 1868 to recover an enhanced rent or assessment levied on these lands :

*Held* that the effect of the exception in the Indenture of 1819 being to throw upon the plaintiff the burden of proving his right to enhance the rent (or revenue), which he had failed to do, and Regulation I. of 1808, Section 4, clauses 1 and 2, containing admissions by Government (which then was the immediate landlord of the *Shilotridárs*), that Government itself had no such right, plaintiff was consequently not entitled to raise the rent.

*Held* also that though the language of the exception was so large that it might have been construed to exclude any right on the part of the grantees to receive rent (or revenue), yet that as the defendant or his predecessors had, ever since 1819, paid to the plaintiff and his predecessors the revenue paid before that time to Government, that revenue passed under the Indenture of 1819 to the grantees in the deed.

THIS was a special appeal from the decision of G. Ayerst, Assistant Judge at Tanna, affirming the decree of the Subordinate Judge of the same place.

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J., on the 2nd September 1874.

*Macpherson* (with him *Shántárám Náráyan*) for the appellant.

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DA'DIBHA'I JAHA'NGIRJI v. RA'MJI BIN BHA'U.

*Vishvanáth Náráyan Mandlik* for the respondent.

WESTROPP, C.J.:—In this case, the sole question is, whether the plaintiff, who is *Inámdár* of (amongst other villages) the village of Dahisur or Dyenseer, in the Island of Salsette, is entitled to raise the rent (or revenue assessment) payable to him in that capacity by the defendant, who is the occupant of certain lands in that village. There was also in the courts below a question whether the lands, the subject of the present claim, are *Shilotri* lands, which question has, in both of those courts, been determined in the affirmative, and it has been admitted by the learned counsel for the appellant (plaintiff) that he cannot, on special appeal, dispute that finding. Silotri *alias* Shilotri *alias* Shelowtr *alias* Serrotore lands are mentioned in Section 4 of Regulation I. of 1808 as follows:—

"*First.*—There has existed from that time (the period of the acquisition by the British of the Island of Salsette (Sashti) in A.D. 1744 by conquest) a description of landed property, under the denomination of Shelowtr (called also Serrotore), and consisting of lands said to have been acquired by the natives on favourable terms of tenure, by purchase from their Portuguese masters, which property has been respected throughout the subsequent revolutions.

"*Second.*—Another description of Shelowtr tenure consists of certain spots of ground gained from the sea by embankment, or brought into cultivation from the jungle or forest, at the personal expense of individuals, who have thence continued to pay thereon, in several instances, a fixed quit-rent without reference to the produce."

Section 36 of the same Regulation in its 9th, 10th, 11th, 12th, 13th, and 15th clauses, and Section 59, take a distinction between Serrotore holdings of white batty ground (chowka) and Serrotore holdings of black batty ground, "otherwise styled khara or salt batty ground, which is probably the same distinction as that taken in Section 4, already quoted. The 48th section of the same Regulation shews that Government, in making a grant of lands in the village

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of Powey and other villages in the same Island in A.D. 1799 to Mr. Helenus Scott, expressly excepted such parts thereof as were of Serrotore tenure, and, in that exception, took no distinction between white and black batty ground.

The present plaintiff claims to be *Inámdár* as son of Jehángir Ardasir. Cursetji Ardasir and Jehángir Ardasir were the sons of Ardasir Dady, with whom Government had agreed to exchange the village of Dahisur and other villages in Salsette for certain lands in the Island of Bombay.

Ardasir Dady having died before that agreement was carried into effect, Government, by an Indenture of exchange, dated the 25th January 1819, executed in pursuance of that agreement, conveyed the village of Dahisur (which was there described as containing 27 parahs and 18½ adolies of black batty ground and 197 morahs, 1 parah, and 6½ adolies of white batty ground) and the said other villages in Salsette to Cursetji Ardasir and Jehángir Ardasir and their heirs and assigns, "with the exception of such spots of Serrotore tenure as may be therein or on any part thereof, which can only be the property of the said Cursetji Ardasir and Jehángir Ardasir on their purchasing the same from the present proprietors thereof."

The Assistant Judge has not only found that the lands, the rent of which is sought to be enhanced by this suit, are *Shilotri* lands, but that they were so previously to the date of the Indenture of the 25th January 1819, which finding is admitted by counsel to be conclusive on this Court. The defendant, in his written statement, admits that, for upwards of thirty years before the bringing of this suit, he has paid assessment on his *Shilotri* land to the plantiff at a fixed rate.

It is in fact now admitted on both sides, that the rate at which assessment on the defendant's lands was paid to Government before the grant (in exchange) of Dahisur, &c., to the defendant's ancestors in 1819, was 5 rupees, 2 annas, 2 pies, and that the same rate has been since paid to those gran-

tees, without variation, down to 1863-64, when the attempt was made by the plaintiff to raise the rent in conformity with the new valuation then made by the survey officers of Government, and that there is not any evidence of any different rate having been at any time whatever paid by the *Shilotridárs* (including the defendant) to Government.

Both of the courts below have found that, under the above circumstances, the plaintiff is not entitled to raise the rent, and the question for our decision is whether or not that ruling is right in law.

The language of the exception in the Indenture of 1819 is very large, and might perhaps, in the absence of proof of payment of rent by the defendant and his predecessors, have been construed to exclude any right on the part of the grantees even to receive rent (or revenue) in respect of *Shilotri* lands. The exception does not make any distinction between the *Shilotri* lands described in the first clause of Section 4 of Regulation I. of 1808, and those described in the second clause of the same section, nor between white and black *Shilotri* batty ground, and in both of those respects the exception in the Indenture of 1819 tallies with the description, given in Section 48, of the exception in the grant of 1799 of the village of Powey to Mr. Helenus Scott. The Regulation of 1808, however, shows that *Shilotri* lands (both of white and black batty) paid revenue to Government, and it appearing that, ever since 1819, the defendant or his predecessors in the *Shilotri* holding have not paid revenue to Government, but have, without question, paid regularly to the plaintiff and his ancestors the rent or revenue of Rs. 5-2-2, which had previously been paid to Government, we think we are bound to hold that the right to that revenue passed under the Indenture of 1819 to the grantees in that deed. But we are clearly of opinion that the effect of the exception was to preserve to the *Shilotridárs* his rights over the land as they then stood, and that the burden is thereby cast upon the plaintiff to prove his right to enhance the revenue, and that he not only has failed to prove any such right on his part, but that

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the first and second clauses of Section 4 of Regulation I. of 1808 contain admissions by Government (which then was the immediate landlord of the *Shilotridárs*) tending to show that Government had not any such right. Under these circumstances, we must affirm the decree of the Assistant Judge with costs.

*Decree affirmed with costs.*

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[APPELLATE CRIMINAL JURISDICTION.]

Sept. 2.

## REG. v. SAKHA'RA'M MUKUNDJI and three others.

*The Indian Evidence Act. I. of* 1872, *Secs.* 5, 11, 153, 155, *and* 165—*Cross-examination of a witness after his examination by the Court—Trial by Jury—Evidence properly admitted withheld from the Jury—New trial.*

The principle that parties cannot, without the leave of the Court, cross-examine a witness whom, the parties having already examined or declined to examine, the Court itself has examined, applies equally whether it is intended to direct the cross-examination to the witness's statements of fact, or to circumstances touching his credibility, for any question meant to impair his credit, tends (or is designed) to get rid of the effect of each and every answer, just as much as one that may bring out an inconsistency or contradiction, Section 155 of Act I. of 1872.

The statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, where the latter states he was and saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point, Sections 5, 11, and 153 (Illustration C) of Act I. of 1872.

Where such a statement, after being admitted, was withheld from the Jury, the High Court ordered a new trial.

THE four accused persons were tried and convicted of the offences of mischief by fire and being members of an unlawful assembly, by N. Daniell, Acting Session Judge of Poona, and a Jury, and sentenced, for the former offence, to five years, and for the latter to six months' rigorous imprisonment.

The material facts are as follows:—

The accused were charged with having set fire to a Máhárwádá of the village of Wáhle. After examining

several witnesses, the prosecution examined a witness named Kálu Sátu. The defendant's Vakil having declined to cross-examine him, the Session Judge asked him several questions, which elicited matter unfavourable to the accused persons. Their Vakil thereupon requested the Judge to allow him to cross-examine him, with a view to test his veracity; but the Judge refused to allow him to be questioned, except on the matter already recorded in answer to the Court. The Vakil did not avail himself of this permission.

After the close of the case for the prosecution the evidence for the defence was gone into. This included the evidence of witnesses Dhondu and Jánaku, who, among other things, stated that two of the witnesses for the prosecution, named Sávliá and Somiá, were at Dhond Village, and not at the village where the fire took place, at the time when they stated they saw the accused persons there. In the charge to the Jury, the Session Judge, with regard to the evidence of Dhondu and Jánaku, observed :—"This as evidence to impeach the credit of the witnesses Sávliá and Somiá is inadmissible; and as the alleged fact that they were in Dhond on that afternoon is not incompatible with their having visited Wáhlé, a neighbouring village, on the same afternoon, and as the witnesses Sávliá and Somiá have not been asked whether they were not at Dhond on that afternoon, this part of the evidence for the defence cannot be taken as contradictory of the alleged fact that the prisoners, or certain of the prisoners, were seen approaching, and at Sávliá's house."

The appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

*Leith* (with him *Shántárám Náráyan*) for the appellants:—

The Session Judge was wrong in not allowing Kálu Sátu to be cross-examined, and in withholding from the Jury the statements of Dhondu and Jánaku.

*Dhirajlál Mathurádás*, Government Pleader, for the Crown.

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The judgment of the Court was delivered by

WEST, J.:—The objection on the ground of the Session Judge having declined to allow one of the witnesses to be cross-examined cannot be sustained. When the counsel for the prisoner has examined or declined to cross-examine a witness, and the Court afterwards, of its own motion, examined him, the witness cannot then, without the permission of the Court, be subjected to cross-examination. When, after the examination of a witness by the complainant and the defendant, the Court takes him in hand, he is put under special pressure as the Judge is empowered to ask any question he pleases, in any form about any fact relevant or irrelevant (Section 165, Indian Evidence Act); and he is, therefore, at the same time placed under the special protection of the Court, which may, at its discretion, allow a party to cross-examine him, but this cannot be asked for as a matter of right.

This principle applies equally whether it is intended to direct the examination to the witness's statements of fact, or to circumstances touching his credibility, for any question meant to impair his credit tends (or is so designed) to get rid of the effect of all his answers, and of each of them just as much as one that may bring out an inconsistency or contradiction. It is then a cross-examination upon answers—upon every answer given to the Court, and is subject to the Court's control.

The next point is that the Judge misdirected the Jury in telling them that the evidence of Dhondu and Jánaku, who were called by the defence to contradict the statements of Savliá and Somiá, that they saw the accused at Wáhlé when the Máhárwádá was burnt, is inadmissible. The Session Judge said that the evidence of Dhondu and Jánaku that Somiá and Savliá were at Dhond (the latter witnesses having said that they were at Wáhlé) was not admissible to impeach their credit, and that as Savliá and Somiá were not cross-examined by the defence, as to whether they were or were not at Dhond in the afternoon of the day the fire took place, and it was possible for them to have been during

the same afternoon at both places. The statements of Dhondu and Jánaku could not be considered to contradict the statements of these witnesses.

The rule of English law on this point is that the credit of a witness may, amongst other ways, be impeached by evidence of facts, contradictory of the evidence given by him. The express provision of the Indian law is less extensive. The witness's credit, it is provided, can only be impeached in certain specified ways (Section 155), that is, by questions or by testimony going, directly to his credit, not mediately through a contradiction of the particular matter deposed to by him in the case.

In the present instance the Session Judge seems to have been mistaken in supposing that Dhondu and Jánaku were called to impeach the credit of Savliá and Somiá in the sense of the section of the Indian Evidence Act first referred to. They were called to contradict Savliá and Somiá's statements. Their evidence, though not as to the fact in issue, was as to facts which in connection with other facts made the existence of a relevant fact, one immediately connected with a fact in issue highly improbable, and under sections 5 and 11 of this Act such testimony was relevant and admissible. If it is true, as Dhondu and Jánaku allege, that Savliá and Somiá were at Dhond till the afternoon of the day of the fire, it is highly improbable that Savliá and Somiá could have left Dhond at about 11 A.M. or noon, and therefore highly improbable that the accused should have been seen by them at Wáhlé, as they assert, at about 1 P.M. The case is like that in Illustration (*C*) to Section 153 of the Indian Evidence Act, which shows that the admissibility of the testimony does not depend on the cross-examination of the witnesses to be contradicted.

The evidence having thus been properly admitted, it ought not to have been withdrawn from the consideration of the Jury, as it virtually was, by the Session Judge's charge. Its tendency was clearly to show that the alleged fact deposed

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to by Savliá and Somiá of the accused having been seen by them at a particular time and place, was not one that had really occurred, and it ought to have been allowed to have its natural weight with the Jury. We must, therefore, order a new trial.

*Proceedings annulled, and a new trial ordered.*

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[APPELLATE CRIMINAL JURISDICTION.]

Sept. 7.

*Application for exercise of Court's Extraordinary Criminal Jurisdiction.*

*No.* 40 *of* 1874.

## *In re* HARIRA'M BIRBHA'N.

*Recognizance bond—The Code of Criminal Procedure, Sec.* 502.

A Magistrate has no jurisdiction to call on a person who has entered into a recognizance bond, under Section 493 of the Code of Criminal Procedure, to pay the penalty or show cause why he should not do so, without previous *primâ facie* proof, by which is meant evidence on oath, that it has been forfeited. Section 502 of the Code of Criminal Procedure.

THE petitioner, Harirám, was directed by the Magistrate, F. P., W. W. Lock, to pay the penalty of a recognizance bond. His order was allowed to stand by A. Bosanquet, Session Judge of Ahmednagar.

The application for the exercise of the Court's extraordinary jurisdiction was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

*Honourable V. N. Mandlik* for the applicant.

*Dhirajlál Mathurádás*, Government Pleader, for the Crown.

The facts, in so far as they are material, appear in the following judgment of the Court delivered by

WEST, J.:—The petitioner applies for the exercise of the Court's extraordinary jurisdiction. He was directed by Mr. Lock, Magistrate, First Class, in the Ahmednagar District, to pass a recognizance bond to keep the peace under Section

493 of the Code of Criminal Procedure, and having been reported by a Police Officer to have broken the conditions of the bond, the Magistrate declared it forfeited, and exacted the penalty, without having formally taken and recorded evidence before calling upon him to show cause against such forfeiture.

The Session Judge, under Section 295 of the Code, refused to interfere, or to report the proceedings to the High Court.

The question we have to determine is, whether the use of the words "whenever it is proved" in Section 502 makes it necessary that evidence should be taken and recorded by the Magistrate in the usual way in order to afford a foundation for his jurisdiction to call on the party to show cause, and to declare his recognizance forfeited, or whether his failure to do so is a mere irregularity which can be waived by the party affected omitting to take an objection. We are of opinion that the taking and recording of evidence are essential, and that when this is not done there is a failure of jurisdiction, the defect in which cannot be cured by silence or neglect, or waiver, positive or negative, of the party interested (*a*). We are led to this conclusion by a comparison of several sections of the Code. Section 530 prescribes that whenever a Magistrate is satisfied that a dispute, likely to induce a breach of the peace, exists, he is to proceed in a certain way. The jurisdiction to adopt that procedure accrues when the Magistrate, on such information as he thinks sufficient, is satisfied, and has recorded that he is so. Section 141 of the Code enacts that "a complaint, or a police report, gives jurisdiction to a competent Magistrate to inquire into, or try, an offence covered by the facts complained of or reported, and also to try, and commit for trial, any person who, at the time when the complaint or report is made, or subsequently, appears to have committed the offence disclosed;" but it does not say a police report gives jurisdiction to a Magistrate to call on a person,

(*a*) See the remarks of the Judges in *Park Gate Iron Company v. Coates*, L. R. 5 C. P. 634 and Broom's L. M. 670.

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*In re* HARIRA'M BIRBHA'N.

who has given a recognizance bond, to pay the penalty without previous *primâ facie* proof that it has been forfeited.

What affords the strongest inference, however, is Section 491, which relates to calling upon persons to give recognizances. Explanation I. requires a credible report or other information, and it is enacted that one Magistrate cannot bind over a person until he has adjudicated on the evidence. The expression used in Section 502 is very much stronger. It is "whenever it is proved," and therefore proof, at least *primâ facie*, that a bond has been forfeited, is necessary before he who was bound by it can be called on to pay the penalty or show cause against his doing so. It is but reasonable and consistent that the Legislature should have required a more careful and deliberate procedure in this stage than in the earlier one provided for by Section 491. There must, we think, in the first instance, be proof in the ordinary legal sense, that is, evidence on oath, to ground the Magistrate's further procedure under Section 502. We must, therefore, annul the proceedings, and order the fine to be refunded.

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[APPELLATE CRIMINAL JURISDICTION.]

Sept. 10.

## REG. v. BA'PU YA'DAV and RA'MA' TULSIRA'M.

*Coin—Money—Indian Penal Code, Secs.* 230 *and* 231.

The test of whether a coin is money or not, is the possibility of taking it into the market and obtaining goods of any kind in exchange for it. For this its value must be ascertained and notorious: *Held*, therefore, that to counterfeit a coin of the Emperor Akabar's time was not an offence under Sections 230 and 231 of the Indian Penal Code.

THIS was an appeal from a conviction for counterfeiting coin by A. Bosanquet, Session Judge of Ahmednagar, and a sentence of seven years' rigorous imprisonment.

The Judge held it proved that one of the accused persons made certain coins, bearing on one side the superscription "Jaláluddin Akabar Badsháh Gází San 988"; and on the other the celebrated formula of the Mahomedan faith, viz:—

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"There is no other God but the one God, and Mahomed is the Prophet of God." He also held it proved that the second accused was present when these coins were made.

The Judge, in his finding, then went on to say:—"The Mahomedan School-master Sharif Ali Beg says that he has seen a great many genuine coins similarly superscribed. The Shroff Multánchand says that he would buy coins like these, if genuine, and would give one or two annas more than a Queen's rupee, or even more, for each of them. He, therefore, considers the stamp on them to imply that they contain a certain amount of silver, and are of a certain value. This is all that is required by a coin, for it is to be used as an instrument of commerce. Whether small shop-keepers in the *Bazár* would take such coins or not is not quite material. It is enough for the purposes of this case, that money dealers would treat them as money."

The appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

*Shántárám Náráyan* for the appellant:—The coins which the accused are convicted of counterfeiting were not money; and they were intended to be used only as ornaments. No offence is therefore committed.

*Dhirajlál Mathurádás*, Government Pleader, for the Crown.

PER CURIAM:—A coin is metal used for the time being as money. Money is a general standard of value and medium of exchange. The test of whether a particular piece of metal is money or not (supposing it genuine), is the possibility of taking it into the market and obtaining goods of any kind in exchange for it. For this its value must be ascertained and notorious; that it is known to persons of special skill or information is not sufficient. In the present case it was necessary to call an expert to say what the coin was of which the tokens in the prisoners' possession were imitations. This was in itself a proof that it could not be money, the knowledge of which must be generally diffused in order that it may discharge its necessary functions. A

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second witness was called, who deposed that he would purchase coins of the kind imitated at a particular price. This was itself a denial that they were money. The witness referred them to quite another standard as the measure of their value, and described what he would do as "buying," which is applied not to money passing as money, but to things taken in exchange for money. The test of common usage or notoriety, which, according to I Russell on Crimes 95, determines whether old coins are the Queen's coins, is still more applicable to the determination of whether they are current coins, or, as the Indian Penal Code says, "used for the time being as money."

It is clear that the tokens imitated in this case were not money, and therefore not coins within the meaning of Section 230 of the Indian Penal Code, and the conviction and sentence must be reversed.

*Conviction and sentence reversed.*

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[APPELLATE CIVIL JURISDICTION.]

Sept. 10.

*Special Appeal No.* 11 *of* 1874.

RANGO VITHAL and another. *Defendants and Appellants.*

RIKHIVADA'S BIN RA'YACHAND. *Plaintiff and Respondent.*

*Limitation—Civil Procedure Code, Sec.* 269—*Summary order—Possession.*

The words "suit to establish his right" in Section 269 of the Civil Procedure Code mean a suit to establish his right to *present* possession; but where there is a subsisting right which is contradicted by the summary order under that section, and which is to be properly asserted by such a suit, the suit, by the person dispossessed or refused possession, to establish his right, must be brought within one year from the date of the order, failing which he cannot sue afterwards on any portion of such right. It is otherwise, where his right is consistent with the order and the possession given under it.

THIS was a special appeal from the decision of E. Cordeaux, Assistant Judge of Punâ, confirming the decree of the Subordinate Judge of Talegâm.

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RANGO VITHAL v. RIKHIVADA'S BIN RA'YACHAND.

The plaintiff sued to recover the amount due on a mortgage bond executed by the 1st defendant, Rango Esáji. The plaintiff alleged that the property mortgaged had been sold at a court's sale, in execution of a decree against Rango Esáji, and purchased by the 2nd and 3rd defendants, Rango Vithal and Rámchandra Vishvanáth; that the plaintiff was dispossessed by the court's order upon a complaint preferred by the said purchasers under Section 269 of the Civil Procedure Code. The plaintiff sought to recover the amount from the defendants personally, or, in default of payment, to have the property sold in satisfaction of his claim.

The 1st defendant admitted the claim. The 2nd and 3rd defendants pleaded limitation, on the ground that the suit was not brought within one year from the date of the court's order made under Section 269 of the Civil Procedure Code.

The Subordinate Judge allowed the plea of limitation, and dismissed the claim as against the defendants Nos. 2 and 3.

On appeal, the Assistant Judge, S. Tagore, held the claim not barred, for the reasons given in the following extract from his judgment :—

"Section 269 provides 'the order shall not be subject to appeal, but the party against whom it is given shall be at liberty to bring a suit to establish his right at any time within one year from the date thereof.' What right? It is clearly a right to the possession of the property sold. But the present suit is not one to recover possession; it is to enforce the plaintiff's lien against the mortgaged property. It is one thing to claim possession as mortgagee, and another to enforce his lien against the mortgaged property. In the one case the cause of action would arise at the date of the plaintiff's dispossession by the Court's order; in the other not before the expiration of five years" (fixed for the payment of the mortgage debt) "from the date of the bond; and I cannot see upon what principle it can be contended that the plaintiff should lose his lien altogether, simply because he failed to maintain his possession as mortgagee as against the auction

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purchaser in a proceeding instituted under Section 269. As regards clause 5 of the Limitation Act, it provides limitation of one year for suits to set aside summary orders and decrees of a civil court. This, however, is not a suit to set aside the court's orders passed on the execution proceedings; it is simply to enforce the plaintiff's right of lien against some mortgaged property which has passed into the hands of the auction-purchasers." He accordingly remanded the suit for re-trial on its merits.

Both the Subordinate Judge and the Assistant Judge, E. Cordeaux, decreed in favour of the plaintiff on the merits of the case.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

*Shántárám Náráyan* for the appellants.

*Dhirajlál Mathurádás* (Government Pleader) for the respondent.

*Cur. adv. vult.*

WEST, J.:—The main question in this case is as to the proper scope of the words "his right" in the last sentence of Section 269 of the Code of Civil Procedure. In its first sentence, the section speaks of a "person other than the defendant claiming a right to the possession of the property sold as proprietor, mortgagee, lessee, or under any other title," and then, when the court has dealt by an order with the complaint of the person setting up such a right, it is said that "The order shall not be subject to appeal, but the party against whom it is given shall be at liberty to bring a suit *to establish his right* at any time within one year from the date thereof." His right in this last sentence should, on the ordinary principles of interpretation, be identical with the right spoken of in the earlier one, that is, the right to present possession. This is the sole right on which the Court executing the decree has summarily adjudicated, and if its adjudication has been wrong, all that the party, injuriously affected by it, can be reasonably expected to do is to establish "his right" to that of which he has been deprived,

namely, his possession. If the order has been made against the purchaser in execution of the title of the judgment-debtor, it amounts to a denial that that title embraces a right to present possession. If the title does embrace such a right, the order ought to have been different, and the purchaser suing "to establish *his right*" must succeed if he establish this right to present possession, no matter what other rights over the same land may be vested in his opponent. But the words, it is plain, are intended to have but a single sense, whether they are applied to the execution-purchaser or his antagonist: if they mean the right to present possession for the former, they must mean it also for the latter.

The purchaser of the land of a judgment-debtor, sold in execution of a money-decree, stands in a position quite analogous to that of the successful claimant in a suit for the land. If the claimant in the latter case dispossesses a third person, that person may present an application, which is disposed of by the Court as an ordinary suit. What has to be tried in that suit is, as said by Melvill, J., in Special Appeal 406 of 1872, "the right of the decree-holder to dispossess him under the decree," and though, according to some earlier decisions of the High Court at Calcutta, the procedure seems to have been regarded as of the same nature as that under a writ of right, yet the later and general current of authority has reduced the inquiry to one into the right to possession. The applicant must have been in possession to have the advantage of an inquiry under Section 230, but if he was in possession, that possession is a sufficient *primâ facie* proof of his right to be restored to it. Under Section 269, the case between the ousted claimant and the execution-purchaser is not tried as a regular suit, and the unsuccessful party has no remedy by way of appeal. The Court disposes of the contention by a summary order, relief against which must be sought by a regular suit. But this regular suit, in its purpose and effect, ought, it would seem, to occupy towards the summary order the same place as the inquiry conducted like a suit under Section 230. If the suitor establishes

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a right to possession, he ought to be re-instated, no matter what other rights may be vested in his adversary. It is only the right to possession, which is immediately in issue; no other right can be conclusively determined by the inquiry except so far as it is essential to the decision of the right to possession.

The same words, as those now under consideration, occur in Section 246. There it is said of a party unsuccessful in raising or maintaining an attachment that he "shall be at liberty to bring a suit to establish his right." "His right" in this section means his right to have certain property or part of it subjected to or exempted from sale. All that is the judgment-debtor's may properly be sold, so that as to the applicant to raise the attachment, if he was out of actual possession, "his right" includes all that he can establish against the full proprietorship of the judgment-debtor and no more; if he was in possession, all that cannot be established against him as the judgment-debtor's and no less. Whatever interest the judgment-debtor has is to be made available, and the object of the inquiry and the suit is to determine what that interest is as against the intervenor. Thus the alleged rights of the opposed proprietors are brought into conflict in their fullest possible extent. The suitor's proprietorship or partial proprietorship from the greatest to the smallest conceivable interest in the property may properly be tried and ought to be brought forward. In determining "his right" in such a suit, the Court disposes finally of all rights, which have combined to make it up. All the claimant's rights, and, therefore, every individual right, being thus the proper subject of inquiry, the limitation clause shuts out the assertion of any right at all after the lapse of one year. This is the principle involved in the decision of Special Appeal No. 49 of 1874, where a plaintiff alleging that property of *A* and *B*, to the possession of which he was entitled, had been attached and sold, notwithstanding his opposition, in execution of a decree against *A* alone, was not allowed after the lapse of a year to sue even for the restoration to him of the land, which he averred was *B's*. The

whole right had been in question in the summary inquiry as to what might be sold in execution, and the assertion of the whole right and therefore of every part of it was barred except in so far as it was brought forward within a year.

The right under Section 246, therefore, may be much more extensive than that under Section 269. It may include any thing proposed to be sold as *A's* which *Z* says is wholly or partly his, and the suit that follows the order may be for the establishment of full proprietorship or of the minutest fragment of interests. Under Section 269, as *C* ought not to be dispossessed in execution of *A's* decree against *B*, he should succeed on proving his possession until some better title is shown against him. And as this should be so in the summary inquiry, so also in the regular suit, by which any defect of that inquiry is to be remedied. Otherwise *A*, by suing *B* and on the sale of *B's* alleged interest, may get *C* turned out and put on proof of his title. All, therefore, that comes necessarily in question as a terminal issue in the suit under Section 269 is the right to possession.

This may rest on complete proprietorship, on a mortgage with possession, on a lease, or on mere possession unexplained. In any of these cases, the right, if established, is sufficient to ground a decision against the purchaser in execution. But suppose the purchaser, in a summary inquiry, seeks to expel an alleged lessee, whose lease, he says, is a merely colourable one, the result of the inquiry is to satisfy him as well as the Court that the lease is valid, and that it has still two years to run. Is he bound in such a case to sue within one year to establish his reversionary right, or else to lose it altogether? It may never have been denied; it cannot have been concluded by a summary inquiry into the right to immediate possession. Suppose, again, that *A*, in possession of fields L, M, and N as mortgagee, is ousted by the purchaser of his mortgagor's interest in execution. He seeks re-instatement, but, in the summary inquiry, it turns out that field N has not been enumerated in the mortgage amongst those the possession of which he is to hold until payment. The sum advanced has been made a charge on field N as well as the others, but the money is not to be

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paid for three years. Must he sue within one year to establish "his right," which at first, he said, had been invaded by the purchaser? There is nothing to establish, that is nothing, which has necessarily been invaded, or which can be in that predicament for 3 years to come. The order has been quite correct, yet in granting possession to his adversary, it has left his rights consistent with that present possession intact. It would seem to be almost absurd to require an unsuccessful applicant in such cases to bring a suit within one year to establish a right, which is not to operate for some time longer, and which is not necessarily contradicted by the summary order for possession.

In contrast to cases of the kind just considered, stand those, in which the rights of the claimant come to a single point, are capable of immediate exercise, and, if they exist at all, may properly be disposed of by a single adjudication. If *A*, an alleged proprietor, is dispossessed by *Z*, an execution-purchaser, under Section 269, and fails in his application for re-instatement, the decision against him may rest either on a denial of his proprietorship or on an affirmation of an existing right to present possession consistent with his proprietorship. In the latter case, if he is satisfied with the reasons given by the Judge for deciding against him, it would be vain for him to sue within a year either to obtain a possession, to which, he is satisfied, he will not be entitled for some years to come, or to establish an ultimate proprietorship, which has been already recognized as his right. In the former case, however, his right as a whole is pronounced against. He is said to have no right. The possession acquired under the adjudication is wholly adverse and a standing contradiction to his title. His natural and proper remedy under our system of procedure is a suit for restitution of the possession of which he has been deprived, but as his title has been wholly denied, he may also seek such a declaration of it as the evidence will enable the Court to make. If he was in truth a proprietor in possession, all his rights will have coalesced to constitute "his right," which has to be tried in the regular suit to be brought within 12

months. All ought to be advanced, and the omission to bring any of them forward will properly exclude him from doing so afterwards.

Similarly in the case of a mortgagee in possession, the order under Section 269 may be based on a denial of the mortgage altogether, or on a denial of its alleged effect in giving to the mortgagee a present right to possession. If the latter be the ground taken, and the reasons satisfy the mortgagee, it cannot have been intended that he should be forced to sue within a year, or at any time to establish a right, which he recognizes as not existing. If, however, the order is based on the spuriousness or invalidity of the mortgage, it necessarily contradicts his title and every right which he could set up under the deed. The possession obtained under it is an assertion that he has no right at all, and challenges him directly to establish such a right as he has. He, too, then, like a proprietor, is, in such circumstances, called on to sue to establish "his right" denied in its whole extent, without delay, and may properly do so in a suit to recover that possession of which he has been deprived. It was not intended, we think, that where the whole question between the parties might thus be brought to issue and decision without delay by a suit for possession, the person dispossessed should be at liberty to lie by for more than one year. His right, if it exists, being capable of immediate enforcement, ought to be asserted and established within that time.

The result, to which we are led by these considerations, is that where there is a subsisting right, which is contradicted by the summary order, and the possesssion obtained or confirmed under it, and such right continues to subsist during 12 months so as to ground a suit for possession, and to be properly asserted by such a suit, the suit, by the person dispossessed or refused possession, to establish his right must be brought within one year, failing which he cannot sue afterwards on any portion of such right, but that, in other cases, as his right is consistent with the order and the possession, he is not forced to any action until some present

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relief becomes legally claimable. In the present case, the right of Rikhivadás was wholly denied and his mortgage pronounced invalid by the order of the Subordinate Judge. His proper remedy was a suit, on the mortgage thus refused recognition, to recover the possession, of which he had been deprived. In seeking this, it was incumbent on him, to prove his mortgage and establish its validity, to bring forward his whole right under it, as the right had been altogether contradicted. He failed to do this within a year, and his suit merely to enforce his charge on the property brought after that period was, we think, barred by the last sentence of Section 269.

We, therefore, reverse the decree of the Assistant Judge with costs, and restore the first decree of the Subordinate Judge.

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[APPELLATE CIVIL JURISDICTION.]

September 15.

*Civil Referred Case No.* 10 *of* 1874.

BA'BA'JI BIN KUSA'JI.....*Plaintiff and Appellant.*
MA'RUTI, minor, by his mother and guardian GAJA'I ...*Defendant and Respondent.*

*Certificate of Administration—Act XX. of* 1864—*Mother of a Minor.*

An order for the issue of a certificate of administration to a particular individual ought not to be made until it is ascertained whether that individual is willing to take it.

A certificate of administration ought not to be forced upon the mother of a minor unwilling to take it.

Where an order for the issue of such a certificate to the mother of an infant was made, on the default of the mother to appear and show cause why it should not be issued to her :

*Held* that such default in appearance ought not to have been accepted as her assent to the issuing of the certificate to her.

Course pointed out where no relative or friend of a minor can be found willing to take such a certificate.

THIS reference was made by R. F. Mactier, District Judge of Satara, for the opinion of the High Court. The facts of the case will fully appear from the following observations submitted by the District Judge :—

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"On the 5th of April 1872, Bábáji bin Kusáji applied to this Court, as he stated, under Act XX. of 1864, in order that a certificate, as guardian and administratrix of her infant son, Máruti, might be granted to Gajái, widow of Eshvant, deceased, against whom he had a claim, and wished the guardian of the infant to be placed in a position to enable him, Bábáji, to sue her as guardian of the minor heir of the deceased Eshvant. The decision of the High Court in *Dhondibá* v. *Kusá* (*a*), and that in Appeal No. 6 of 1870, under Act XX. of 1864, and other similar decisions, were put forward as authority for this application.

"This application of Bábáji, under the above ruling of the High Court, was entertained, and notice was served on Gajái to appear, to take out the certificate, or show cause for her not doing so. Gajái did not appear, and, under the ruling of the High Court, an order was passed that Gajái should receive a certificate as guardian of the infant Máruti.

"On the strength of this order having been given, copy of which he obtained, Bábáji sued Gajái to recover the amount of a debt due by her husband Eshvant, making her a defendant, as guardian and manager of the minor Máruti, son and heir of Eshvant deceased. The case was heard by the Subordinate Judge, First Class, who dismissed the suit on the ground that though an order had been passed on Bábáji's application to give Gajái a certificate, she had not actually taken out the certificate, and was not, therefore, properly made a defendant.

"Bábáji has now appealed against the decision of the Subordinate Judge, dismissing his suit, and the case has been partly heard. * * *

"This Court has done all that it could possibly do, in appointing Gajái guardian of her infant son, on the application of a third party, and it appears to have gone somewhat beyond the law in even doing so much, as there seems to be no law to *force* a person to take out a certificate, and none to authorize a third party to get another person to be ap-

(*a*) 6 Bom. H. C. Rep. A. C. J. 219.

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pointed guardian, who will not apply to be so made of his own accord. * * * This Court has done all that it could do. The question, then, is, should the Subordinate Judge have refused to admit Gajái as a defendant without the actual certificate of guardianship? According to the *strict* reading of Section II. of Act XX. of 1864, the Subordinate Judge was right, for Gajái has not actually *obtained* a certificate. But I know of no law to force Gajái to come and obtain a certificate; and as she cannot be so *made* to take a certificate, and as the Subordiate Judge was right, on the other hand, in not admitting her name as a defendant until she *did* hold a certificate, the matter, as it stands, leaves me in doubt as to what is to be done.

If this Court were to appoint the *Nazir* a guardian *ex-officio* of a minor under the charge of the Civil Court, this would be attended with great inconvenience. Many such minors as this one have no property whatever which could be made available to pay for taking charge of the estate; and though, in *this* case, there may be some property, there are many in which there is none at all, and yet the *Nazir* would have all the trouble of defending suits against the minor under his charge without any remuneration at all.

"If the *Nazir* were made by this Court trustee of every minor's estate, the 'manager' of which would not take out a certificate, it is probable that this difficulty would be got over, but it would not be without a great deal of unremunerated trouble to the *Nazir* of the District Court, and it might probably also involve him in expense."

The reference was considered by WESTROPP, C.J., and KEMBALL, J., on the 15th of September 1874.

WESTROPP, C.J. :—This Court concurs with the District Judge in thinking that a certificate of administration cannot be forced on the mother of the infant, and is further of opinion that an order for the issue of such a certificate to a particular individual ought not to be made until it is ascertained whether that individual is willing to take it. In the present case, the order for the issue of the certificate ap-

pears to have been made on default of the mother of the infant to appear and show cause why the certificate should not be issued to her. Such default in appearance ought not to be accepted as an assent to the issuing of the certificate to the non-appearing party. If no relative or friend of the minor can be found who is willing to take out a certificate, the District Judge will be under the necessity of naming some officer of his Court or some respectable nominee of the suing creditor of the infant. Difficulty will sometimes arise in such cases, but this Court is inclined to think, and certainly hopes, that the instances will be rare in which a minor whom it is worth the creditor's while to sue, will be so completely destitute of friends and relatives as that none can be found to protect his interests. This Court forwards herewith to the District Judge a copy of a judgment given on the 27th March 1874, in Appeal No. 1 of 1874, under Act XX. of 1864, *in re Motirám Rupachand Márwári*, which shows that the suit may be brought before the guardian is appointed, but that the suing creditor should make an early application afterwards for the nomination of the guardian (*b*).

(*b*) Reported *Supra*, p. 21.

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September 16.

[APPELLATE CIVIL JURISDICTION.]

*Regular Appeal No. 44 of 1873.*

MOTICHAND JAICHAND.....*Plaintiff and Appellant.*

DA'DA'BHA'I PESTANJI.....*Defendant and Respondent.*

*Subject-matter of a suit—Bombay Courts Act XIV. of 1869—Suit for a declaration of right to property under attachment—Estoppel—Court Fees Act VII. of 1870, Sch. II., Art. 17, Cl. 3; Sec. 10, Cl. 2, and Sec. 12, Cl. 2—Procedure—Appeal to the High Court.*

In a suit for a declaration that the plaintiff had a right of property and possession in a certain house under attachment, being in effect a suit for the removal of the attachment:

*Held* that the judgment-debt, in respect of which the house was attached, being less than Rs. 5,000, no appeal lay to the High Court.

*Quære.*—Whether the plaintiff, having successfully contended before the Assistant Judge that his plaint was for a declaration of right merely without consequential relief, and therefore properly stamped, could be permitted to say in appeal that the house was the subject-matter of the suit within the meaning of Section 16 of the Bombay Courts Act XIV. of 1869.

The plaint in such a suit as the above, having for its object the relief of the house from attachment, does seek consequential relief.

THIS was an appeal from the decision of A. D. Pollen, Acting Assistant Judge at Surat, in original Suit No. 30 of 1871.

The facts of the case are briefly these. The defendant Dádábhái Pestanji held a decree against two brothers, Sivchand and Saváichand, and applied for the attachment and sale of a house in execution of that decree, as the property of his judgment-debtors. The plaintiff, Motichand, thereon sought, under Section 246 of the Code of the Civil Procedure, to raise the attachment. But his application was rejected, and he was referred to a regular suit. The plaintiff, therefore, brought the present suit to obtain a declaration of his right to the house and its possession, and filed his plaint on a stamp of ten rupees. The defendant, among other things, objected that the plaint was not sufficiently stamped. The suit was heard by the Assistant Judge at Surat, who held the plaint sufficiently stamped, and rejected the plaintiff's claim on the merits. The issues, as raised by the Assistant Judge, and his findings on them, were as follows:—

"1. Is the stamp sufficient? 2. Has the plaintiff established his right of property in the house, and can it be recognised?

"My finding on the first issue is that the stamp is sufficient; and on the second, the plaintiff has not established his right of property in the house.

"As to the first point, I hold that according to the Court Fees Act, Schedule II., Section 17, a stamp of ten rupees is sufficient, whether in a suit to set aside a summary decision of a Civil Court (p. i.), or in a suit to obtain a declaratory decree, where no consequential relief is prayed (p. iii.) It is argued that in this case a decree for the plaintiff would be the same thing as giving him consequential relief; and that, therefore, the decision of the Calcutta High Court in the case of *Mokhoda Dossee* v. *Nobin Chunder Mitter* (*a*), should be followed; but I think the cases differ in that, though a declaratory decree might be sufficient authority to a Government official to pay over interest on promissory notes to the person named therein; still in the present case a declaratory decree would not bind a hostile party to hand over the house in dispute, and thus the relief would not be necessarily consequential."

From this decision, the plaintiff preferred an appeal to the High Court, also on a stamp of ten rupees. He, however, fixed the valuation of his claim at Rs. 5,005.

The appeal coming on for argument and disposal before WESTROPP, C.J., and KEMBALL, J., on the 16th September 1874—

*Inverarity* (with him *Dhirajlál Mathurádás*, Government Pleader,) took a preliminary objection on behalf of the respondent that the appeal did not lie to the High Court. He contended that the plaintiff's suit was in effect one for the removal of the attachment placed upon the house by the defendant, and that, therefore, its value must be fixed by the amount of the judgment-debt, due under the defendant's

(*a*) 16 Calc. W. R. 259 Civ. Rul.

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decree, in execution of which the house was attached, and that, as the judgment-debt was less than 3,000 rupees, the value of the suit must be taken to be less than the amount which would allow an appeal to lie to the High Court from the decree of an Assistant Judge under Section 16 of the Bombay Courts Act XIV. of 1869.

*Branson* (with him *Nagindás Tulsidás*), for the appellant contended that the subject-matter of the suit was the house to which the plaintiff sought to have his right declared, and that, therefore, the value of the subject-matter in dispute in the present suit was the market value of the house for the purpose of determining the Court's jurisdiction: *Jeebraj Singh* v. *Inderjeet Mahton* (*b*), *Nauhoon Singh* v. *Toofance Singh* (*c*). As the market value of the house exceeded Rs. 5,000, the appeal lay to the High Court.

WESTROPP, C.J.:—We think that this Regular Appeal does not lie. The appellant contended that it does, because he says that the value of the house exceeds Rs. 5,000, a point as to which there is some doubt. Assuming, however, that the value of the house does exceed Rs. 5,000, we think that there would be great difficulty in permitting the plaintiff to say now that the house was the subject-matter of the suit within the meaning of Section 16 of the Bombay Courts Act XIV. of 1869. He contended, and succeeded in his contention before the Assistant Judge, that the suit was not for the house, but merely for a declaration of his right to it, and that he did not seek any consequential relief, and, therefore, that a ten rupees stamp was sufficient for his plaint under the Court Fees Act VII. of 1870, Schedule II., Article 17 Clause III.

Irrespectively, however, of that Act, and of the plaintiff's contention under it in the court below, it appears to us that the real subject-matter of the suit was the attachment placed upon the house by the defendant, whose object it was to get rid of the attachment. It is not pretended that the amount of the judgment-debt, for which the attachment was

(*b*) 18 Calc. W. R. 109 Civ. Rul (*c*) 20 *Idem* 33. Civ. Rul.

laid on, even reached Rs. 5,000, and we are, in fact, informed that it was for a sum below Rs. 3,000. If the plaintiff failed in this suit as against the defendant, and the house were sold for what the plaintiff alleges its value to be, there would not be any objection, so far as the defendant is concerned, to the plaintiff receiving the surplus proceeds of sale left after satisfaction of the defendant's decree.

Even if we were of opinion that this Regular Appeal lay we would have felt it our duty to stay the hearing of it under the Court Fees Act VII. of 1870, Section 12, Clause 2 (taken in connection with Section 10, Clause 2), until the plaintiff paid court fees upon the amount of the attachment both on the plaint and the appeal, as we think the court below "wrongly decided to the detriment of the revenue" in holding that the plaintiff sought by his plaint no consequential relief. We are quite clearly of opinion that the object of the suit was to relieve the house from the attachment.

We decide this case quite irrespectively of the Court Fees Act, and do not desire to give any opinion on the cases reported in 18 Calc. W. R. 109, and 20 *Idem.* 33.

The appeal is dismissed with costs.

[APPELLATE CIVIL JURISDICTION.]

1874. Sept. 21.

*Regular Appeal No. 72 of* 1873.

SADA'SHIV MORESHVAR GHA'TE. *Defendant and Appellant.*

HARI MORESHVAR GHA'TE, deceased, by his adopted son and heir GANESH..... *Plaintiff and Respondent.*

*Adoption—Aquiescence—Estoppel—Hindu Law.*

Where the defendant actively participated in the adoption of the plaintiff by the defendant's brother, and by many acts signified to the plaintiff and to his adopting father the defendant's complete acquiescence in the adoption, and thereby encouraged the plaintiff, who was an adult, to assent to such adoption, and allowed the adopting father to die in the belief that the adoption was valid, and finally concurred in the performance, by the plaintiff, of the funeral ceremonies of his adopting father:

*Held* that the defendant was estopped from disputing the validity of the adoption.

*Quære.*—Whether a Brahmin adult whose "Upanayana" and marriage ceremonies have already been performed in the family of his natural father, can be adopted into another family according to Hindu Law.

THIS was a regular appeal from the decision of Vishnu Moreshvar Bhidé, First Class Subordinate Judge at Násik.

The plaintiff, Ganesh, brought this suit for a partition of the family property, moveable and immoveable, which jointly belonged to the defendant Sadáshiv Moreshvar Ghâte and his deceased brother, Hari Moreshvar Ghâte, on the ground that he (plaintiff) was the adopted son of the latter. The defendant, among other objections, pleaded that the "Upanayana" and marriage ceremonies of the plaintiff having taken place in the family of his natural father, before the alleged adoption, the adoption was invalid. The Subordinate Judge held the plaintiff's adoption valid, partly on the ground that an adoption once made with the necessary ceremonies cannot be set aside on such objections as those urged by the

defendant, and partly on the ground of active participation on defendant's part in the plaintiff's adoption. On the latter point, he observed :—

"Again, it has been most clearly established that the defendant has been acquainted with the fact of the plaintiff's adoption by his brother, Hari Moreshvar, ever since the day the adoption took place; that the plaintiff had been living for several years as a member of the defendant's family; that the 'Munja' of the plaintiff's son and the marriages of his two daughters took place in the defendant's family and *Gotra*, and that the plaintiff performed the obsequies of his adoptive father with his knowledge and, I may say, with the consent of the defendant. These circumstances show that the defendant has consented to the adoption of the plaintiff."

The Subordinate Judge, accordingly, decreed in favour of the plaintiff's claim. In appeal, the defendant again took exception to the validity of the plaintiff's adoption, but was held estopped from doing so, by his long and active acquiescence in it.

The appeal was heard by WESTROPP, C.J., and KEMBALL, J., on the 21st September 1874.

*Shántárám Náráyan* (with him *Vishnu Ghañashám*) for the appellant.

*Vishvanáth Náráyan Mandlik* for the respondent.

WESTROPP, C.J. :—On the ground that the defendant was an active participator in the adoption, which he now disputes, and by many acts, mentioned in the evidence and noticed by the Subordinate Judge, signified to his deceased brother Hari Moreshvar, the adopting father, and to the plaintiff, the adoptee, his, the defendant's, complete concurrence in the adoption of the plaintiff, and thereby encouraged the plaintiff, who was an adult, to assent to such adoption, and allowed his (the defendant's) brother Hari Moreshvar to die in the firm belief that such adoption was valid, and finally concurred in the performance of the funeral ceremonies of Hari Moreshvar by the plaintiff, this Court holds the de-

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fendant to have estopped himself from disputing the validity of the adoption (see Special Appeal 50 of 1873, decided on the 6th August 1873) (*a*), and on this ground affirms with costs the decree of the Subordinate Judge. On the point as to the validity of the adoption, this Court deems it unnecessary to express any opinion, and the other points have not been now relied upon for the appellant.

(*a*) S. A. 50 of 1873 (*Chintu* v. *Dhondu*) was heard and decided by Westropp, C.J., and Nánábhái Haridás, J., on the 6th August 1873. The following is the judgment :—

WESTROPP, C.J.:—This Court is of opinion that the defendants are prevented from questioning in this case the validity of the adoption of the plaintiff Chintu Bháskar. It is found by the District Judge that the defendants' father Dhondu Babáji, was present at the ceremony. That adoption, whether valid or invalid, took place upwards of twenty years before the institution of this suit. The father of the defendants acquiesced in it, and showed that acquiescence conclusively by associating Chintu Bháskar with him as a co-plaintiff in a suit brought against Vithu Bál Pátel to recover this very land. In that suit, Dhondu Bábáji (the defendants' father) and Chintu Bháskar obtained a decree under which Dhondu Bábáji was put into possession of the land, he giving security to the Court to put Chintu Bháskar into possession of his share.

Under these circumstances, it is impossible, so far as regards this piece of land, to allow the defendants, whose only title is through Dhondu Bábáji, to dispute Chintu Bháskar's right to a third share in the land and to a third share of the net profits thereof from the date at which Dhondu Bábáji was put into possession up to the present day.

We decline, therefore, to enter into the question as to whether or not Bháskar could make a valid adoption. The conduct of the defendants father renders it unnecessary and improper to entertain any such question in this suit.

We reverse the decrees of the courts below with costs of the suit and of both appeals, and decree that the plaintiff is entitled to a one-third share of the land in dispute, and that he be put into possession thereof by partition, and that the defendants do pay to him out of the property of their late father, Dhondu Bábáji, one-third portion of the net profits of the said land received by the said Dhondu Bábáji from the date at which he was put into possession of the said land under the decree against Vithu Bál Pátel until this 6th day of August 1873. The amount of such profits to be determined by the Court executing this decree.

See also *Anandráv Sivájee* v. *Ganesh Eshvant Bokil*, 7 Bom. H. C. Rep. Appx. xxxiii., *Gooroo Prosunno Singh* v. *Nil Madhub Singh*, 21 Calc. W. Rep. Civ. Rul. 84.

[APPELLATE CIVIL JURISDICTION.] 1874. Sept. 21.

*Special Appeal No. 95 of 1874.*

KONA'PA' BIN MAHA'DA'PA' .....(*Original Defendant*) *Appellant.*

JANA'RDAN SUKDEV ...(*Original Plaintiff*) *Respondent.*

*Execution—Sale—Confirmation—Rights of purchasers at Court sales—Lâches.*

The purchaser at a Court's sale buys only the then existing right, title, and interest of the judgment-debtor, and therefore ordinarily takes, subject to the prior right, contingent on confirmation, of a former purchaser, though such former purchase be confirmed subsequently to his own.

*Quære.*—Whether the case might not be different if the delay in the confirmation of the former puchase were accompanied by great lâches on the part of the first purchaser, or by other special circumstances.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Satara, reversing the decree of the Subordinate Judge of Ashta.

On the 2nd February 1872 the defendant, Konápá, had purchased at a Court's sale the interest of one Rávji Jiváji in certain land. This sale was not confirmed till the 8th July 1872. In the meantime the plaintiff, Janárdan, had purchased the right, title, and interest of the same judgment-debtor in the same land, at a Court's sale, under another decree on the 6th March 1872, and this sale was confirmed on the 6th April 1872.

The plaintiff then sued the defendant to recover possession of the land. The defendant pleaded that the sale to him, though not confirmed till after that to the plaintiff, yet, being of prior date, entitled him to priority. On this ground the Subordinate Judge decreed in favour of the defendant. In appeal, however, the District Judge reversed the decree of the first court, on the ground that a sale of immoveable property was not a sale till confirmed under Section 256 of the Civil Procedure Code, and that, therefore, the plaintiff was entitled to priority in respect of the prior confirmation to him of his purchase.

1874.

KONA'PA' BIN MAHA'DA'PA' v. JANA'RDAN SUKDEV.

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J., on the 21st September 1874.

*Shántárám Nárâyan* for the appellant.

*Vishvanáth Nárâyan Mandlik* for the respondent.

WESTROPP, C.J. :—The sale to the defendant, Konápá, on the 2nd February 1872, though not confirmed until the 8th July 1872, gave him, as against Rávji Jiváji, the judgment-debtor, from the 2nd of February 1872, a contingent right to the land, *i.e.*, contingent on subsequent confirmation. The plaintiff, on the 6th March 1872, purchased only the right, title, and interest of the judgment-debtor, Rávji Jiváji ; that right, title, and interest was subject to the defendant Konápá's contingent right, which has since become absolute. Konápá's purchase is, therefore, entitled to precedence over that of the plaintiff. We accordingly reverse the decree of the District Judge, and restore that of the Subordinate Judge, with costs throughout on the respondent.

We are not to be understood as saying that, were the delay in the confirmation of the sale to Konápá to have been accompanied by great lâches on his part, or other special circumstances, the case might not be different. Here there is not any allegation of such lâches or other special circumstances.

*Decree reversed.*

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[APPELLATE CIVIL JURISDICTION.]

October 5.

*Special Appeal No.* 107 *of* 1874.

BHIMRA'V JIVA'JI and others...*Plaintiffs and Appellants.*

BHIMRA'V GOVIND.....*Defendant and Respondent.*

*Watan—Implied Contract—Small Cause Court—Jurisdiction—Act XI. of* 1865, *Sec.* 6—*Extraordinary Jurisdiction of the High Court—Annulment of proceedings before Subordinate Judge and District Judge.*

Where a case properly cognizable by a Small Cause Court had been heard and determined by the Subordinate Judge, and in appeal by the District Judge, the High Court, in the exercise of its extraordinary jurisdiction annulled the proceedings of the two lower courts.

1874.

BHIMRA'V JIVA'JI and other v. BHIMRA' GOVIND.

THIS was a special appeal from the decision of N. Daniell, Acting District Judge of Dharwar, in Appeal No. 150 of 1872, reversing the decree of A. M. Cantem, Subordinate Judge at the same place.

This action was brought by Bhimráv Jiváji and two others, who claimed a refund of Rs. 47 and 8 annas, which the defendant Bhimráv had received from them. They alleged in the plaint that they and the defendant were members of one family, and held a *watan*; that a division having taken place in the family on the 25th December 1857, the members agreed to pay the Government *Judi* due on the *watan* in equal shares; that the name of the defendant was entered in the Government books as *Khátedár*, and that, as such, he was to recover the amount of the *Judi* and pay it to the revenue authorities; and that the defendant received the amount claimed in excess of what was due from the plaintiffs.

The Subordinate Judge awarded the plaintiffs' claim. In appeal, however, the District Judge reversed the decree of the first court, and dismissed the plaintiffs' suit.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ., on the 5th October 1874.

*Girdharlál Dayáldás*, for *Dhirajlál Mathurádás*, for the appellant.

*Mánikshá Jehángirshá*, for the respondent, took a preliminary objection to the hearing of the special appeal, on the ground that the suit having been brought on an implied contract, was one within the cognizance of a Court of Small Causes; *Ratan Shankar Reváshankar* v. *Gulábshankar Lálshankar* (*a*).

*Girdharlál Dayáldás*, for the appellant, prayed that in the event of the Court holding that the special appeal did not lie, the proceedings of both the lower courts might be annulled on the ground of want of jurisdiction, as there was a Court of Small Causes at Dharwar, so that the plaintiff might bring a fresh suit.

(*a*) 10 Bom. H. C. Rep. 21.

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WEST, J. :—This is plainly a case of what the English law regards as an implied contract, and, therefore, according to the ruling of 10 Bom. H. C. R. 21, one within the cognizance of the Small Cause Court. No special appeal lies in such a case, and we must reject the one now made. But the lower courts had not jurisdiction of the cause, there being a Small Cause Court at Dharwar, to which the cognizance of the case properly belonged; and, in the exercise of the Court's extraordinary jurisdiction, we will annul the proceedings of the Subordinate Judge, and of the District Judge in the original suit and the regular appeal.

Costs on appellant.

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[APPELLATE CRIMINAL JURISDICTION.]

July 15.

## REG. *v.* MALA'PA' BIN KAPANA' and others.

*Indian Evidence Act, 1872, Secs. 30, 114, 133, and 157—Evidence of accomplice—Corroboration—Confession.*

The evidence requisite for the corroboration of the testimony of an accomplice must proceed from an independent and reliable source, and previous statements made by the accomplice himself, though consistent with the evidence given by him at the trial, are insufficient for such corroboration.

The confession of one of the prisoners cannot be used to corroborate the evidence of an accomplice against the others.

THIS was an appeal against the convictions and sentences under Sections 302 and 396 of the Indian Penal Code. The four prisoners were tried along with one Parápá by S. Tagore, Joint Session Judge at 'Kaládgi, for murder and dacoity, and were convicted of both those offences. Parápá was convicted of dacoity only, but did not appeal.

The appeal was heard by NA'NA'BHA'I HARIDA'S and LARPENT, JJ.

*Macpherson* (with him *Ghanashám Nilkanth*) for the appellants :—The Session Judge has based the conviction of the accused upon the testimony of the approver, Murgiá, and upon the statement of a fellow-prisoner, Parápá. He has used the statements made by Murgiá to his parents and the police to corroborate his evidence at the trial. This he cannot do :

*Reg.* v. *Mohesh Bisrás and others* (*a*). Nor can he admit the statement of Parápá to corroborate Murgiá : *Reg.* v. *Banwári Lál and others* (*b*).

*Leith* (with him *Dhirajlál Mathurádás*, Government Pleader,) for the Crown.

NA'NA'BHA'I HARIDA'S, J. (in delivering the judgment of the Court), said :—We are unable to uphold the conviction in this case. It rests principally upon certain statements made by Murgiá, an accomplice in the murder of Rachápá, which is the offence charged. The Acting Joint Session Judge, at the outset of his judgment, remarks that by Section 133 of the Indian Evidence Act an accomplice is a competent witness, and, noticing Section 114 and Illustration (b), proceeds to observe that these, read together, empower the Court to reject the testimony of such a witness, unless corroborated in material particulars. So far we have no reason to differ from the Joint Session Judge; but we are unable to agree with him in his view either of the nature of the corroboration required, or of the value of the evidence adduced for that purpose in this case.

Section 157 of the Evidence Act, no doubt, provides that any former statements made by a witness at or about the time when the fact in issue took place, or before any competent authority, may be proved to corroborate his testimony; and accordingly the Session Judge has made use of Murgiá's statements, made on different occasions to his parents and to police officers, shortly after the murder. But such corroboration, we think, hardly suffices. It can scarcely be said to answer the purpose for which juries are advised by Judges to require the evidence of an accomplice to be confirmed. From the position in which he stands it is considered unsafe to act upon his evidence alone. Hence the rule requiring confirmation of it as to the prisoners by some independent reliable evidence. But his statement, whether made at the trial or before the trial, and in whatever shape it comes

(*a*) 19 Calc. W. R. 16 Cr. Rul. (*b*) 21 *Idem* 53 Cr. Rul.

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before the Court, is still only the statement of an accomplice, and does not at all improve in value by repetition.

The force of any corroboration by means of previous consistent statements must evidently depend upon the truth of the proposition that he who is consistent deserves to be believed. If that proposition be not universally true, what becomes of the virtue of previous consistent statements? One may persistently adhere to falsehood once uttered, if there is a motive for it; and should the value of such a corroboration ever come to be rated higher than it now is, nothing would be easier than for designing and unscrupulous persons to procure the conviction of any innocent men, who might be obnoxious to them, by first committing offences, and afterwards making statements, to different people and at different times and places, implicating those innocent men.

But it is also contended that the confession of Parápá, the fellow-prisoner of the accused, affords further corroboration. We cannot accede to this contention. Under Section 30 of the Evidence Act we may, no doubt, take into consideration Parápá's confession as against the accused; but we do not think we can use it to corroborate the evidence of Murgiá, because it cannot be put upon a higher footing than Parápá's evidence would be, if he also were admitted to give evidence as an accomplice. In such a case the evidence of one accomplice could not be taken to corroborate the evidence of the other; but the evidence of either would require corroboration before it could be acted on.

This is one ground upon which we reverse the convictions and sentences passed upon the accused persons; but there is yet another ground in the case upon which also we base our decision. Even if we were inclined, which we are not, to act upon the uncorroborated testimony of an accomplice, we could not place the slightest reliance upon the various statements of Murgiá, which abound with material discrepancies. With those discrepancies before us, we should not have believed Murgiá, even if he had not been an accomplice. In arriving at the conclusion to reverse the convic-

tions of the accused we have taken into consideration the feud existing in the village.

We may, in conclusion, observe that Murgiá might well have been convicted of murder on his own confession, and we do not see that there was any ground for making him an approver. One person has thus escaped. We may also observe that Parápá having pleaded guilty, might also have been convicted of murder, regard being had to Section 237 of the Code of Criminal Procedure. But his case not being before us, we need say no more about it.

We accordingly reverse the convictions and sentences passed upon the accused who have appealed to us.

*Convictions and sentences reversed.*

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[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No.* 307 *of* 1873.

July 22.

CHITKO RAGHUNA'TH RA'JA'DIKSH .....*Appellant.*

JA'NAKI, widow of Raghunáth Rájádiksh, and others .....*Respondents.*

*Hindu Law—Conditional adoption.*

Where a Hindu widow in whom had vested by inheritance the whole of her husband's property, moveable and immoveable, agreed to accept a boy in adoption on an express agreement by his father that during her lifetime she should be entitled to such property, subject, however, to the boy's maintenance and education, and upon the faith of such agreement adopted the boy, it appearing that she would not have done so at all if it had not been for such agreement:

*Held* that the agreement was binding upon the adopted son, and that the son's proprietary right was subject to the interest thereby created in favour of his adoptive mother. *Held* also that under the Hindu law the power exercised by a father in giving his son in adoption is not only co-extensive with the power of a guardian, but is more like the power of an absolute proprietor.

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge of Ratnágiri, reversing the decree of the Subordinate Judge of Málwan.

The plaintiff sued, on attaining majority, his adoptive mother for possession of certain moveable and immoveable property. He joined two persons in possession of a portion of this property as parties to the suit.

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The mother answered that, *inter alia*, according to the agreement upon the faith of which she had adopted the plaintiff, he was not entitled to the property during her lifetime.

The Subordinate Judge gave a decree to the plaintiff for the immoveable property sued for, but it was reversed on appeal.

The special appeal was heard by NA'NA'BHA'I HARIDA'S and LARPENT, JJ.

*Nagindás Tulsidás* for the appellant.

*Macpherson* (with him *Ghanashám Nilkanth*) for the respondents.

NA'NA'BHA'I HARIDA'S, J. :—We are of opinion that we must confirm the decree of the court below in this case. The Assistant Judge says : " It is clear that the adoption took place under the knowledge of the agreement and in pursuance of it ; when it was actually committed to writing is not very material. I think, however, that it must have been drawn up before the adoption. I find then distinctly as a fact, that the plaintiff Chitko was given and taken in adoption under the agreement contained in this deed, and that his father was a consenting party to the agreement, and gave him in adoption under the terms contained in the deed." This finding we must accept as final. The deed referred to, Exhibit No. 15, contains the following provision : " By virtue of the adoption, this son will have, however, no manner of right over my immoveable and moveable property during my life, even when he is of age ; nor will he be entitled to manage the estate. After my death, he is the rightful heir, subject to the following conditions. Till that event, I am to bring him up, to give him food and clothing, and to bear the expenses of his education. The provision of law or *shastra*, should there be any, that when a son has been adopted, the mother cannot have any proprietary right over her estate, should not affect this transac-

tion, for the boy has been adopted on this stipulation only that he would have no right whatever to the estate during my lifetime." The Assistant Judge also says: "There is a mutuality in the agreement. The widow says to the father of the infant 'if you will agree to these terms on behalf of your son, I will adopt him; if not, I will not'." It is thus found that the father of the boy gave him in adoption, and the lady accepted him, on the express understanding mentioned in the deed, and that, if it had not been for such mutual understanding, the adoption would not have taken place at all. If the father had said, "I do not agree to such a condition," the lady would have said, "then I do not want to adopt your son;" and there is no law which would have compelled her to adopt him or any other boy. Such being the case, unless very strong grounds are shown why we should not do so, we must give effect to the intention of both the contracting parties. Mr. Nagindás has indeed contended that such a stipulation as the above is opposed to the fundamental principles of the Hindu Law of adoption; but he has not pointed out to us any texts, nor cited any cases to that effect. On the other hand, Mr. Macpherson has referred us to several cases, which, though by no means determining the question now raised, may yet be regarded as pointing, in some degree, to a contrary inference—[see 6 Bom. H. C. Rep. A. C. J. 229, 230; 7 *Idem*, Appx. 21, 22; S. A. 32 of 1871; 2 Macn. 183]. In this state of the authorities, it would be difficult for the Court to hold that such a stipulation could not be made. But admitting, for the sake of argument, that it could not, how can it be consistently urged that the boy acquired any rights at all in the family of the adoptive mother? That stipulation is an essential part of the contract of adoption in this case. According to the finding, it was the main consideration moving from the other side, which induced her to adopt. If it is void, the whole contract is affected by its invalidity. If it is merely voidable, the plaintiff must either acquiesce in or repudiate his natural father's act as a whole.

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To allow him to acquiesce in one part of it and to repudiate another, would be to enable him to perpetrate a fraud upon his adoptive mother by disappointing the expectations raised in her by that act, of which he desires to have all the benefit. As was contended for her, she did not accept him in adoption except upon the faith of, and subject to, the above stipulation ; and if the law does not recognize such acceptance, there was no other on her part. There were not then such gift and acceptance in this case as are requisite to constitute a valid adoption, and the boy consequently cannot be said to have acquired any legal status in the family, to which he was transferred by his natural father. In either view of the matter, therefore, this suit must fail..

It has also been contended that the father, as guardian, could not enter into any stipulation unfavourable to the minor. It does not, however, appear in this case that the contract of adoption, of which the stipulation in question was an essential part, was, on the whole, unfavourable to the minor. Indeed it would rather appear that the contrary was the case. The Assistant Judge says : " In nine cases out of ten, the father acting for his son's benefit would agree to the terms." The boy has thereby acquired in the adoptive family considerable rights, both present and future, which, except for that stipulation, his father would not have been able to secure to him. Besides, it is a fallacy to suppose that, for the purpose of giving in adoption, the power of a father is only co-extensive with the power of a guardian. In the eye of Hindu Law, when a man gives his son in adoption, he would seem to exercise a power, more like the power of an absolute proprietor than that of a guardian. Thus a millionaire may, by such gift, even though all his property be ancestral, transfer one of his sons to a family possessed of no property whatever ; and the adoption once duly made so completely changes the boy's status, that ever after he is regarded as the son of the pauper to whom he was given by his natural father, without the least possibility of

his getting back into his natural family: see *Ravibhadra* v. *Rupshankar* (*a*).

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We think the rights acquired by the plaintiff in consequence of his adoption, are subject to the rights created in his adoptive mother's favour by the stipulation to which in a great measure that adoption itself was due, and must, therefore, confirm the decree of the lower court with costs.

*Decree confirmed.*

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[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No.* 457 *of* 1873.

July 6.

TIKAMDA'S JAVA'HIRDA'S .....*Appellant.*

GANGA' KOM MATHURA'DA'S .....*Respondent.*

*Immaterial alteration in a document—Interest at a penal rate.*

Where a subsequent addition to a document, though unauthorised by the executant, serves only to state explicitly what is already implied in the document, and what the law would infer from it, such addition is immaterial, and does not vitiate the instrument. Interest at a penal rate should not be awarded if there be no demand for it, or for a sum by way of compensation for special damage, on the part of the plaintiff.

THIS was a special appeal from the decision of C. F. Shaw, District Judge of Belgaum, affirming the decree of Dayárám Mayárám, First Class Subordinate Judge at the same place.

Gangá instituted this suit against Tikamdás Javáhirdás to obtain a declaration that she was entitled to a certain sum of money left by her late husband, Mathurádás, with the defendant for the maintenance of the plaintiff. She alleged in the plaint that Rs. 1,000 had been deposited with Tikamdás under a written agreement (Exhibit No. 3), dated the 29th January 1866, to the effect that Tikamdás was to pay Gangá every month Rs. 5 from interest due on the deposit, and Rs. 1 from the principal, until she reached the age of 18 years, when

(*a*) 2 Borr. 650.

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the balance of the deposit should be paid to her. The plaintiff also sought to recover the amount due to her for some previous months, but not paid by the defendant. Tikamdás, among other objections, pleaded that the postscript to the agreement had been forged subsequently to the date of its execution by him. The Subordinate Judge framed an issue on the point, and found it in favour of the plaintiff, for the following reasons :—

"My finding on the second issue is that the postscript and the clause below the signature of the defendant do not appear to be new additions. They are proved to have been written at the time the agreement was executed * * * *. The writing of the postscript tallies entirely with the deceased Nudini's undisputed handwriting, and the Guzerathi writing below the defendant's signature also tallies with that of the defendant. The terms of the agreement are strong enough, and I see that the addition of the postscript does not in any way alter the terms of the agreement. The postscript simply states that the defendant is not to hand over the money deposited with him to the plaintiff's husband's order without the plaintiff's concurrence, and the Guzerathi writing below the defendant's signature is to the same purport. As regards the evidence given by witness No. 70, it is clear that his demeanour, while under examination, was such as to throw suspicion on his evidence. Witness No. 63, who appears to be a respectable man, says that he found the agreement when he attested it, in the same state as it is now."

The Subordinate Judge decreed in favour of the plaintiff's claim, and the District Judge, in confirming that decree, remarked regarding the alleged alteration, "the Court is doubtful of the *tázákalam*." Assuming it is a forgery, it in no way invalidates the bond No. 3, which in other respects is admitted. * * * The Court finds Exhibit No. 3 is genuine in fact."

The special appeal was argued before WEST and LARPENT, JJ., on the 6th July 1874.

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TIKAMDA'S JAVA'HIRDA v. GANGA'KO MATHURA'D

*Dhirajlál Mathurádás* for the appellant:—The Lower Court was wrong in not deciding whether the "tázákalam" added to the agreement, Exhibit No. 3, was a forgery, and in holding that the alteration in question, though made without the authority of the appellant, did not invalidate the agreement. As the document was in the possession of the respondent, she ought to have been called upon in the first instance to explain that the alteration had been made before its execution by the appellant: *Petamber Manikjee* v. *Moteechund Manikjee* (*a*). [WEST, J.:—The law on the subject of alterations has been considerably modified since the date of the Privy Council decision, as will appear from *Aldous* v. *Cornwell* (*b*) and *Rámásámy Kon* v. *Bhavání Ayyar* (*c*)]. The interest awarded by the Lower Court, two per cent. per mensem, is exorbitant.

*Vishnú Ghanashám, contra*:—The concurrent finding of the two courts below regarding the genuineness of Exhibit No. 3 is conclusive on the point. The Judge below was justified in granting the high rate of interest, as he thought that the appellant had behaved very badly in keeping the respondent out of her money.

WEST, J.:—The judgment of the District Court is objected to, on the ground that the Judge was bound to find explicitly whether the addition to the document sued on, in its original shape, had been made before its execution or not. He has found, however, that the "Exhibit No. 3 is genuine in fact," and as the only dispute was with respect to the addition, we may take this as a decision that the document was executed in the form in which it was sued on. This was the finding of the Subordinate Judge, and the District Judge, though not without doubt and hesitation, plainly intends to adopt it.

But the other point in the judgment of the District Court, that though the addition, or *tázákalam*, should be unauthorized by the executant, still it would not invalidate the docu-

(*a*) 5 Calc. W. R. 53 P.C. (*b*) L. R. 3 Q. B. 573.
(*c*) 3 Mad. H. C. R. 247.

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ment, though it has been strenuously argued against, seems to have been properly decided. That addition serves only to state explicitly what was already clearly implied in the document, and what the law would infer from it. In such a case, as ruled in *Aldous* v. *Cornwell*, the alteration, as it is immaterial, does not vitiate the instrument. In the case just cited, the authorities, mentioned in the one at 3 Madras H. C. R. 247, are discussed, and the rigour of the older views of the law on this subject somewhat further mitigated.

The award of interest at a penal rate by the District Court, without any demand for it, or for any sum by way of compensation for special damage, on the part of the plaintiff, was not, we think, in accordance with the law. We must reduce the award to 6 per cent. per annum instead of 24 per cent. Their costs in this Court to be borne by the parties respectively.

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[APPELLATE CIVIL JURISDICTION.]

July 15.

*Miscellaneous Appeal No.* 6 *of* 1872.

MIR AJMUDDIN, heir of FA'TMA' BEGAM, deceased ..... *Appellant.*

MATHURA'DA'S GOVARDHANDA'S, GUL'ABDA'S, and ISHVARDA'S JAGJIVANDA'S. } *Respondents.*

*Execution—Attachment of decree—Limitation Act XIV. of* 1859, *Sec.* 20—*Mutual relations of decree in original suit, regular and special appeals, and of execution thereon—Application for execution based on the original decree, but reciting those in regular and special appeals.*

A notice or order to a judgment-debtor, *A*, not to pay the amount decreed to his judgment-creditor, *B*, will not in any case serve to keep the decree alive in favour of *C*, a judgment-creditor of *B*, at whose instance the notice or order is issued, much less in favour of other judgment-creditors of *B*, with whom *A* had nothing to do. The period during which a decree remains under attachment should not be deducted from the time within which proceedings must be taken for the execution of the decree: *Chandi Prasád Nandi* v. *Raghunáth Dhar* (*a*) dissented from.

(*a*) 3 Beng. L. R. Appx. 52.

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MIR AJMUDDIN v. MATHURA'DA'S GOVARDHANDA'S and others.

An application for execution of the decree in the original suit and proceedings thereon, which, without formally and expressly asking for execution of the decrees in regular and special appeal, recognized those decrees, and sought relief consistent with the final decree, can be judicially recognized as a proceeding for the purpose of executing the final decree.

THIS was a miscellaneous appeal from the decision of Mukundráya Maniráya, First Class Subordinate Judge of Surat, directing the execution of a decree obtained by the respondent Mathurádás against Fátmá.

The respondents Gulábdás and Ishvardás were made parties in this Court, they having attached Mathurádás's decree.

The material facts are as follows:—

The decree in the original suit, brought by Mathurádás against Fátmá Begam as the representative of the original debtor, the late Bakshi of Surat, was passed on the 5th August 1863. A regular appeal was disposed of by a decree of 1st December 1863. In Special Appeal No. 211 of 1864, the High Court, on the 5th October 1864, modified the decrees of the courts below by varying, to some extent, the amount awarded, by declaring that certain stipends received since the death of the late Bakshi should not be liable to the creditor's claim, and by similarly exempting one-third of the building called the Daryá Mahál at Surat, which, as the Court held, Fátmá Begam possessed in a right not derived from the deceased Bakshi, though as to the other two-thirds she was his representative. On the 22nd December 1864 the respondent Gulábdás attached the decree so obtained by Mathurádás.

Immediately on obtaining his decree in the original suit Mathurádás sought execution. An order for attachment and sale of the property of the Bakshi in Fátmá Begam's possession was made by the Principal Sadar Amin on the 7th August 1863. This extended to the whole of the Daryá Mahál, as of other property enumerated as the Bakshi's in the list furnished by Mathurádás with his application. Further proceedings on this application appear for the time

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to have been suspended; but after the decision of the High Court had been pronounced, Mathurádás, on the 23rd February 1865, sought execution by an application in which the original decree was set forth as that on which the applicant's right was grounded, but which also recited the regular and special appeals, and set forth the amount due according to the High Court's decree. The money thus realized was paid to Mathurádás's creditor, Gulábdás, on the 4th April 1866.

On the 4th March 1865 Fátmá Begam made an application to the Principal Sadar Amin, in which, referring to the application and the order of the 7th August 1863, she directed attention to the subsequent decrees of the District Court and of the High Court, and prayed that execution might be restricted, according to the terms of the last decree, to two-thirds of the Daryá Mahál and of the *Mogláí laks* as proprietress of which she was the late Bakshi's representative. She also pointed out that Mathurádás's decree having been so attached by Gulabdás, Mathurádás could no longer obtain execution upon it. Gulábdás then tried to have Mathurádás's interest in the decree of the High Court against Fátmá Begam, sold in satisfaction of his own claim. Mathurádás resisted this; and after various intermediate proceedings, the District Judge, on the 13th June 1866, made an order that Mathurádás's execution should proceed, but that the moneys realized should be carried to the credit of Gulábdás.

Proceedings in execution were then renewed, not under a wholly new application, based expressly upon the decree of the High Court, but upon the original application for execution of the Principal Sadar Amin's decree of August 1863. In this application, however, the effect of the subsequent decrees was fully recognized. The Subordinate Judge directed that two-thirds of the Daryá Mahál should be marked off for sale, and one-third reserved to Fátmá Begam as her separate property. Against this order of the 16th October 1866, directing a sale of the two-thirds, Mathurádás appealed to the District Judge, praying that the whole might be sold, and

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two-thirds of the proceeds given to him. This the District Judge refused on the 18th October 1867, and on appeal this order was confirmed by the High Court on the 8th April 1868. An application was then presented expressly for execution of the High Court's decree, 211 of 1864, on the 5th October 1869. The order made on this application was the subject of the present appeal, heard by WEST and LARPENT, JJ.

*Scoble*, Advocate General (with him *Khanderáv Moroji*), for the appellant:—The application for the execution of the High Court's decree is barred by Section 20 of Act XIV. of 1859, no effectual proceedings having been taken within three years next preceding the application, which is dated 5th October 1869, and the decree itself 5th October 1864. The decrees of the lower courts are merged in that of the High Court: *Kistokinker* v. *Burrodacaunt* (*b*). In this case the Privy Council has held that the final decree is the only one capable of execution.

*Macpherson* and *Leith* (with them *Dhirajlál Mathurádás*, Government Pleader,) for the respondent Mathurádás. There was a *bonâ fide* proceeding under the application on the 5th of August 1863, which continued to September 1869, when two-thirds of the Daryá Mahál was sold. It is true that the execution of the High Court decree was not expressly sought for, but that decree was mentioned in our application, and the relief we sought was what was given us under that decree. The opposition made by Fátmá Begam could not have been made but for the High Court decree.

Gulábdás and his brother recovered judgment against us, and attached our decree on the 22nd December 1864. An order was issued to Fátmá Begam not to pay us. This attachment is in force still, and we are entitled to claim the deduction of the time since it was first placed: *Chandi Prasád Nandi* v. *Raghunáth Dhar* (*c*).

(*b*) 10 Beng. L. Rep. 101. (*c*) 3 Beng. L. R. Appx. 52.

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All the steps taken subsequent to the High Court decree, which was brought to the notice of the executing Court, and was fully recognized by it, should be regarded as proceeding in execution of that decree : *Bipro Doss* v. *Chunder Seekar* (*d*).

*Dhirajlál Mathurádás* for the respondents Gulábdás and Ishvardás :—On the 16th of July 1866 the District Judge, on the application of Mathurádás, directed him to proceed with the execution of his decree, and pay over the proceeds to us. Since this time Mathurádás acted as our agent. The prohibitory order issued to him and Fátmá Begam on the 10th of August 1868 keeps the decree alive for us.

It being clear that all the proceedings after the passing of the High Court decree referred to it, the omission to ask for its execution in express terms was at most an irregularity which can be corrected even now : *Chowdhry Parladh* v. *Chowdhry Janardan* (*e*).

All that Section 20 of the Limitation Act requires is, that some proceeding, whether by the Court or by the party, should be taken within three years : *Kondaráju* v. *Rámá Krishnámmá* (*f*).

This has been done. And an attachment itself acts as a perpetual proceeding : *Brooks* v. *Páttam Mari* (*g*).

*Scoble*, in reply :—Execution of the High Court decree, which absorbed the decrees of the lower courts, was never asked for. The case of *Chandi Prasád Nandi* v. *Raghunáth Dhar* is bad law. It is not impossible for a judgment-creditor, whose decree is attached, to take measures for the enforcement of his decree ; and as a fact in this very case Mathurádás did take such measures. Gulábdás attached the benefit coming to the original judgment-creditor under the decree of the High Court ; but as no proceedings were taken under that decree, he could take no benefit.

(*d*) 7 Calc. W. Rep. Civ. Rul. 521. F. B. *id. ib.* 522.
(*e*) 6 Calc. W. R. 15 Mis. Rul. (*f*) 4 Mad. H. C. Rep. 75.
(*g*) *Idem* 316.

In this case the High Court's decree became extinct three years after it was passed, viz., on the 5th of October 1867.

The judgment of the Court was delivered by

WEST, J. :—It will be convenient in this case first to consider the effect as regards limitation of the attachment of Mathurádás's decree against Fátmá Begam by his own judgment-creditor, Gulábdás. This attachment was made a couple of months after the decree of this Court in the special appeal (211 of 1864), by which the decrees of the lower courts were somewhat modified, and the extent of Mathurádás's rights as against Fátmá Begam finally settled. The attachment was made by a notice under Section 236 of the Code of Civil Procedure, directing Fátmá Begam not to pay, and Mathurádás not to receive, the amount of the decree until authorized by a further order of the Court. It has been argued that this was a step towards the execution of Mathurádás's decree, by which it was kept in force until the order should be withdrawn or superseded, but to this view we cannot accede. It was, no doubt, a step towards the execution of Gulabdás's decree against Mathurádás to attach property or a debt in execution of it, and the attachment having thus been once made, the "proceeding" would continue until the attachment was removed or superseded. This seems to follow from the judgment of Lord Cairns in *Máhárájáh Dhiraj Máhtábchand Báhádur* v. *Bulrám Singh and another* (*h*). As between Gulábdás and Mathurádás, a portion of Mathurádás's property had been withdrawn from his disposal, in order to make it available for the satisfaction of the former's claim, and so long as this withdrawal continued, the proceeding in execution, though not carried to completion by a sale or realization of the debt, still endured, so that the term of limitation against a further proceeding would have to be counted from its termination. The maintenance of the attachment was, as against Mathurádás, a continued endeavour, tending towards the enforcement of the decree. But how does this affect Fátmá Begam ?

(*h*) 13 Moore I. A. 479.

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The law provided her with a safeguard against execution, when three years should have elapsed, without any proceeding being taken towards enforcing the decree. The order directed to Fátmá Begam having relation to the decree against her, was, it has been urged, a proceeding in execution of that decree. It would be more correct to say that it was a proceeding to prevent the execution. Had Mathurádás sought to enforce his decree for his own benefit, he would have been met by the order. That order empowered Fátmá Begam to withhold the money, if it should be demanded, but she was not, therefore, subjected to a liability to execution for an indefinite period, while the litigation was going on between Gulábdás and Mathurádás, and for three years after its close. The party interested, whichever of them it might be, was bound to take some step towards execution within three years.

Nor can a deduction be allowed, in our opinion, on account of any time, during which, as it is alleged, Mathurádás was prevented by the attachment of his decree from taking effectual steps for getting it executed. The order served on him would not prevent his getting execution with a direction, that the money should be paid into Court. Such an order was, in fact, made in June 1866, with reference to the decree then put into course of execution. And if Mathurádás himself were indifferent, Gulábdás might have obtained execution by the appointment of a manager. It is said no doubt in the case of *Chandi Prasád* v. *Raghunáth Dhar* (*i*) that a deduction is to be made of the time during which the decree is under attachment; but the reason given for this decision does not seem to be a correct one. The attachment is of a kind which does not prevent the adoption of measures towards keeping the decree in force; and even if it were, the law seems to make no allowance on that account. "*Tempus non currit contra non valentem agere*" is no doubt a correct general rule, but it is so as embodying the provisions of the particular laws on the subject of

(*i*) 3 Beng. L. Rep. Appx. 52.

limitation, not as furnishing a controlling principle, by which their construction is to be governed. There is here no provision made for an extension of the time on account of impediments or disqualifications, and though "arguments from analogy may apply where a principle of law is involved, (yet) where the Courts are dealing with the positive enactments of a statute, reasonings founded upon analogies are scarcely applicable": *Per Cur*: in *Rámchander Dutt* v. *Jugheschander Dutt* (*j*).

An addition to the statutable period of limitation is, we think, to be allowed only when it is statutably authorized.

The observations we have just made apply to the other attachments of Mathurádás's decree obtained in this Court in Special Appeal No. 211 of 1864, equally as to the attachment laid on it by Gulábdás on 22nd December 1864. In no case, we think, can it be held that a notice or order to a judgment-debtor, *A*, not to pay the amount decreed to his judgment-creditor, *B*, will serve to keep the decree alive, not only in favour of *C*, a judgment-creditor of *B*, at whose instance the notice is issued, but of *D*, *E*, *F*, &c., other judgment-creditors of *B*, with whom *A* has nothing to do, and whose mutual contentions ought not to deprive *A* of the protection, which, after a reasonable term, the Limitation Law is intended to throw round him.

The question remains whether there have been on the part of Mathurádás proceedings in execution, which independently of the notices already considered, have had the effect of barring the operation of Section 20 of the Limitation Act of 1859. [The learned Judge then, after reviewing the material facts stated above, proceeded as follows :—]

It has been contended for the appellant that Mathurádás, in his several proceedings subsequent to the decision of the High Court, has constantly endeavoured to obtain satisfaction, not in accordance with that decision, but in evasion of it, and on the terms of the decree originally passed in his

(*j*) 12 Beng. L. R. 229, see p. 232.

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favour by the Principal Sadar Amin. We do not think that there has been any attempt of this kind. The decree of the High Court awarded to Mathurádás a larger sum than that awarded by the Principal Sadar Amin. The decree was necessarily transmitted to the Principal Sadar Amin's Court and made a part of the record there. Mathurádás could not rationally expect that it would be overlooked. His application of the 23rd February 1865 distinctly refers to it, and sets forth the amount due in accordance with it. Again, in his appeal against the District Judge's order of the 18th October 1867, Mathurádás relies on the High Court's decree as giving him a right to have the whole of the Daryá Máhál sold in order that two-thirds of its true value may be realized for him. He, no doubt, strove to make all he could by his decrees; but he seems from the date of the one made by this Court to have accepted it without any attempt at evasion or circumvention of the court below, as finally determining the extent of his rights in execution. There is no reasonable doubt but that the decree of the High Court was fully present to the mind of the Principal Sadar Amin and of the parties throughout the proceedings in execution which followed it; and all alike recognized it as the command, upon which they were to act, whether it extended or restricted the operation of the earlier one given by the Subordinate Court.

But then no application, it is clear, was made to the Principal Sadar Amin expressly for the execution of this Court's decree, except the one in February 1865. This, which was finally disposed of in April 1866, more than three years before 5th October 1869, cannot avail as a proceeding to keep the decree in force for the purposes of the latter application. The question then is, whether the proceedings taken by Mathurádás, though not expressly based on the High Court's decree, can, through their practical identity with those that would have been taken expressly on that decree, through Mathurádás's recognition of that decree, and his desire to give it effect, be regarded as proceedings in execution of it, or to keep it in force.

The relation of the decrees in an original suit, a regular appeal and a special appeal is that of three commands, each of which is capable of operating by itself, but the two earlier of which may be either reversed or adopted by the last, either wholly or partially. In so far as the decree in special appeal coincides with the original decree, it may be regarded as identical with it except as to the modal circumstance of dates: the earlier date is brought forward to that of the renewal, by higher authority, of the first command. In so far as the final decree differs from the first, it is a new order, and no date can be assigned to it but that on which it is made. That "identity" or "adoption" expresses the relation of the two decrees, where they agree, better than any term which may imply the annihilation of the earlier command, is evident when we consider that the plaintiff has to seek his remedy in the lowest court, and that the relief accorded to him there ought not to be altered except so far as it is wrong. In other respects, the command should be adopted, and repeated: Civil Procedure Code Sections 350, 360. There may, under our system of procedure, have been a complete or partial execution of the first decree pending the regular and special appeals: Civil Procedure Code Section 338. If the final decree should reverse the one given in favour of the plaintiff by the Court of first instance, the proceedings in execution under the latter are not therefore null. The purchaser at the execution sale has a good title, though the judgment-creditor must refund the money thus realized. The new command creates a new right, which has to be satisfied as well as may be, but without a positive annihilation of the former command, which still remains a ground for rights acquired under it. But if, after partial execution, the new decree affirms the old, it cannot properly be said to supersede or absorb it in the sense of depriving it of its effect. The judgment-debtor cannot come forward and say "Give me damages for the sale of my house under a decree which does not exist;" nor can the judgment-creditor be heard to say "Give me execution for the whole amount of my new decree, which, apart from the old one, awards me so

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much." The whole litigation having a single aim, and the successive orders being directed to the same object, they must be regarded as identical, where they do not differ; and the execution of one within the limits of their coincidence as the execution of all. It has no doubt been said in the High Courts of Calcutta and Madras, as well as of Bombay, that the lower court's decree being embodied or absorbed in that of the higher court, the latter alone is "the decree enforceable by execution," but these expressions had reference to cases, in which there had not been any execution upon the first decree, and in which the only question was as to the date, from which time was to be counted for limitation. As to this, there ought not, according to our view, to be any hesitation in saying that the last decree furnishes the proper date. As to the relation of the successive decrees to each other, apart from authority, their Lordships of the Privy Council have said in *Kistokinker Ghose Roy* v. *Burrodacaunt Singh Roy* (*k*) that "If the question were *res integra*, their Lordships would incline to the view taken by the Judges of the High Court in the present case, viz., that execution ought to proceed upon a decree of which the mandatory part expressly declares the right sought to be enforced." They limited themselves to not expressing dissent, in a similar case, from the rulings of the Madras and Calcutta High Courts (*l*), and we think there is nothing to indicate that their Lordships would accept the doctrine of the later decree being the only one capable of enforcement, in such a sense as to deprive proceedings actually taken on the earlier decree of all efficacy for or against the judgment-creditor in execution of the later.

Still it is possible that proceedings on one decree may agree in external circumstances with those on another without the executions being identical. The same property may be sold in execution of the one or the other of two decrees,

(*k*) 10 Beng. L. R. 101, see p. 114.

(*l*) *Arunache Mathudayan* v. *Veludayan*, 5 Mad. H. C. Rep. 215; *Ram Charan Bysak* v. *Lakhi Kant*, 7 Beng. L. R. 704.

according to the application of the judgment-creditor entitled under both; and a proceeding under the one can have no effect as regards the other. The execution proceedings on one might have been taken on that other, but were not, because the judgment-creditor, having a choice, chose otherwise. Is the present a case of this kind? The first and the last decrees being, as we have seen, partly identical, there could not be an execution of the one within the limits of their agreement, which would not objectively be an execution also of the other, but there would be a subjective difference, as Mathurádás desired the execution of the earlier or the later decree, which should regularly have been indicated by his framing his application accordingly. His application was originally limited to the execution of the first decree. It is said that a change of the desire thus expressed could be intimated so as to receive judicial recognition only by a change in the form of this application—by a new application, that is, resting expressly on the last decree. This was clearly not the opinion, however, of the courts below. They allowed execution to proceed on the application of Mathurádás based upon the first decree, notwithstanding those that followed it, not from any forgetfulness of the latter, but because they thought Mathurádás was proceeding, and intending to proceed, only so far as the final decree allowed him. The form of the application for execution of the High Court's decree, had a separate one been made in supersession of the application of the 5th August 1863, would, as only a single form is provided amongst those prescribed by the High Court, have been the same as that original application with merely an intimation in the fourth column of the form, of the numbers and results of the appeals. This could not in strictness be called an application resting directly on the decree in special appeal, but an application similarly framed was deemed sufficient by the Privy Council in the case already referred to. If, therefore, it be, though informally, brought home to the mind of the Judge, who is asked for execution, that in addition to the original decree, there have been decrees

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in regular and special appeals, a proceeding may be one in execution of the last decree (serving to bar limitation) though not expressly based upon it. In the present case, we are satisfied that while the execution sought, and in part obtained, of the one decree was objectively the execution of the other also, the intention of the judgment-creditor was to obtain what the High Court had awarded to him. This was understood by the Court and by the opposite party, and though, no doubt, there was an irregularity in not proceeding expressly upon the final decree, yet the defective intimation of his purpose by Mathurádás does not, under the circumstances, prevent our judicially recognizing that purpose as being to obtain satisfaction, according to the terms of the High Court's decree. The steps taken by him down to the year 1868, may thus, in our view, be regarded as proceedings taken to enforce the decree of the High Court. As such, they bar the operation of the Limitation Act to prevent further execution on the application of the 5th October 1869, and the order of the Subordinate Judge must be confirmed with costs.

*Order confirmed.*

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[APPELLATE CIVIL JURISDICTION.]

July 27.

*Special Appeal No. 73 of 1874.*

GHELA'BHA'I BHIKA'RIDA'S .....*Appellant.*

PRA'NJIVAN ICHHA'RA'M .....*Respondent.*

*Property of purchaser at revenue sale—Registration—Tender of Government rent by defaulter's mortgagee—Collector's refusal to accept it.*

The purchaser at a revenue sale, held in default of the payment of assessment, takes free of all incumbrances, although the revenue authorities, without otherwise depriving the defaulter of his right of occupancy, under Section 36 of the Bombay Survey Act I. of 1865, have only sold his right, title, and interest: *Abdul Gani* v. *Krishnáji Bhikáji* (10 Bom. H. C. Rep. 16) and *Gundo Shiddeshvar* v. *Mardan Sáheb (Id. Ib.* 419) followed

What operates to create the property recognized as a right of occupancy is the revenue sale and the consequent entry of the occupant's name in the Collector's books. A memorandum, therefore, declaring a person to be the successful bidder at the sale is not an instrument creating or declaring an

interest in immoveable property and requiring registration under Section 18 of Act XX. of 1866.

The Collector may be responsible to the mortgagee of a revenue defaulter for refusing to accept the tender made by him of the Government rent, but if he does refuse it, and the land is sold, the title of the purchaser is unimpeachable.

THIS was a special appeal from the decision of H. Birdwood, Acting Judge of the District of Surat, reversing the decree of Shivlál Nathubhái, Subordinate Judge at Ankleshwar.

The facts of the case are as follows:—

One Dildárkhán, the occupant of a Government piece of land, mortgaged it without possession to the defendant Ghelábhái first in 1863 and again in 1865. Dildárkhán having made default in the payment of the assessment due on the land, it was sold in 1867, and one Husain became the purchaser. He, too, made default, and the plaintiff Pránjivan purchased the land on the 23rd of March 1871.

In the meantime the defendant Ghelábhái in 1867 obtained a decree against his mortgagor, Dildárkkán, and Husain, and in execution of it attached the land and became a purchaser at the court's sale in July 1871. Pránjivan, having unsuccessfully applied to remove the defendant's attachment, brought this suit in the Court of the Subordinate Judge of Ankleshwar.

The defendant answered that the plaintiff took the land subject to his mortgage lien, and that he had registered his certificate of sale, whereas the plaintiff had not registered the document which declared him to be the purchaser at the revenue sale.

The Subordinate Judge rejected the plaintiff's claim, holding that neither Husain nor Dildárkhán were actually deprived of their occupancy by the revenue officers, who simply sold such rights as they possessed, and placed the sale proceeds to their credit.

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The District Judge in appeal reversed that decree, on the ground mainly that the defendant could not, under his purchase at the court sale, oust the plaintiff.

The special appeal was heard by WEST and LARPENT, JJ.

*Chunilál Máneklál* for special appellant :—The proclamation for sale issued by the Mámlatdár professed to sell only the right, title, and interest of the defaulter in the land in dispute. Under Section 36 of the Survey Act, the absolute right of occupany might certainly have been sold ; but as a matter of fact it was not. The fact that the sale proceeds were credited to the defaulter's account shows this beyond doubt. The plaintiff, who is the purchaser of this interest, simply stands in the place of the defaulter ; and the mortgagee-defendant, is, therefore, entitled to maintain his possession till the satisfaction of his lien : *Abdul Gani* v. *Krishnáji Bhikáji* (*a*) and *Gundo Shidlheshvar* v. *Mardan Sáheb* (*b*) follow *The Secretary of State* v. *The Bombay Landing and Shipping Company* (*c*).

That was a case on the Original Side applicable to the town and island of Bombay, and though the Regulations of 1827 have been referred to as authority for showing that land revenue has been made a charge upon land that is a mistake. Clause 3 of Section 5 of Regulation XVII. of 1827 enacts : " In all cases the revenue of the year, if not otherwise discharged, shall be recoverable, in preference to all other claims, from the *crop* of the land assessed." At any rate the decided cases do not apply, as the absolute right of occupancy of the defaulter, was never sold in this case.

The defendant's certificate of sale is registered, and takes precedence over the unregistered memorandum of the plaintiff's sale.

The defendant as mortgagee had offered to pay the assessment due by his mortgagor, and the Collector was bound to

(*a*) 10 Bom. H. C. Rep. 416. (*b*) 10 Bom. H. C. Rep. 419.
(*c*) 5 Bom. H. C. Rep. 23 O. C. J.

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receive it. The courts below having refused to inquire into this matter, the case should at least be remanded.

*Nagindás Tulsidás* for the respondent :—Section 36 of the Survey Act of 1865 is imperative, and absolutely forfeits the right of occupancy on failure to pay the assessment. The Government have no power to deal with a defaulter in a different manner. The practice of crediting a defaulter with the sale proceeds is founded on expediency, see Government Resolution No. 1170, of 12th March 1872, at page 113 of Nairne's Hand-Book. The cases cited by the appellant exactly resemble this case, and govern it. The plaintiff's right of occupancy was perfected by the sale itself and the registry of his name by the Collector. The document in which he was declared the highest bidder need not, therefore, be registered. As to the defendant's offer to pay the assessment, he did not ask for any issue.

PER CURIAM :—We are of opinion that this case is substantially governed by the decisions in *Abdul Gani* v. *Khrishnáji Bhikáji* and *Gundo Shidleshvar* v. *Mardan Sáheb*. These establish that " the land revenue is the paramount charge on the land," and that by selling the occupancy right, the Collector, as the agent of Government, exercises at the moment of sale the right of forfeiture or deprivation vested in the revenue authorities by Section 36 of the Bombay Survey Act. The occupancy, which was taken as a conditional one, is thus brought to an end, and with it fall interests carved out of it.

It was argued, and with much ingenuity, by Mr. Chunilál, that albeit the revenue officers had the power to declare the occupancy rights of Husain forfeited, yet they did not in fact avail themselves of this power. They elected rather according to the rule prescribed by Government Resolution No. 1170, dated 12th March 1872, to treat Husain's occupancy right as an existing property, and to sell it as such under the rules of Regulations XVII. and IV. of 1827. But having been sold as a subsisting property, it must be re-

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garded, it was contended, as sold subject, like other property, to all charges and liens legally created by the owner so as to affect it. It was further urged that only "the right, title, and interest of Husain were sold, not any absolute proprietorship. But when land becomes subject to sale in order to realize a paramount charge, all charges subsequently created must ordinarily be extinguished in order to give effect to the sale, and nothing has been pointed out to us in the rules made by Government under the Survey Act, or Regulation XVII. of 1872, which indicates that any intention was ever entertained by Government of selling a defaulter's land subject to incumbrances created by him. Such a course would be in almost every case injurious either to the defaulter, or to Government, or to both, by the doubt it would create as to the title taken by the purchaser, and was, in all probability, never contemplated. The "*conditional* occupancy" fails when the property is sold, and having been essentially *conditional* all through, has made all subordinate rights, depending on it, conditional also. The notice follows the usual form of those prescribed by the Code of Civil Procedure and the forms based on it, but as these are held sufficient to give to the purchaser under a sale in execution of a decree on a mortgage a right dating back to a time prior to all subsequently created incumbrances, so the purchaser's right in this instance must date back to the beginning of the "conditional occupancy," Government's right to deal with which on a default arose at the same moment as Husain's tenancy.

As to the question of registration, we think that the document No. 3 is not an instrument which creates or declares an interest in immoveable property within the meaning of Section 18 of Act XX. of 1866. What operates to create the property recognized as a right of occupancy is the entry of the name of the occupant in the Collector's books. The revenue authorities can recognize no other, and what they have to deal with is solely the right of occupancy. The paper No. 3 is a mere memorandum from the Mámlatdár that Pránjivan has been the successful bidder at the auction

It does not, therefore, come into competition, under Section 50 of the Registration Act of 1866, with Ghelábhái's certificate as purchaser at an execution sale. Pránjivan's title had already been fully acquired, not by means of a conveyance or any other document passed to him, but by the revenue sale and consequent change of names in the *khátá* or account and by the effect given to this change by the law before Ghelábhái bought the conditional occupany, which by the fulfilment of the condition of forfeiture had become extinct when he purchased.

But Ghelábhái, it is said, being mortgagee tendered the Government rent of Husain's fields. If he did this in the proper way, the rent ought to have been received. The Subordinate Judge gave no finding on the point. The District Judge considered that it could not be raised unless the Collector were made a party. But Section 48 of the Survey Act directs that the dues leviable under it shall be collected according to the provisions of the Regulations, and Regulation XVII. of 1827, Section 12, cl. 7, says that the Collector's order for the realization of the revenue shall occupy "in all respects the place of a judicial decree." This is sufficient to give to Pránjivan an unimpeachable title, although, if the Collector wrongly refused Ghelábhái's tender of the rent under circumstances which made it his duty to accept the tender, he may be responsible for the injury thus done to Ghelábhái.

For these reasons, we confirm the decree of the District Court with costs.

*Decree confirmed.*

1874.
July 28.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No.* 482 of 1873.

SHRIDHAR VINA'YAK .....*Appellant.*

NA'RA'YAN VALAD BA'BA'JI and another ...*Respondents.*

*Res judicata—The Code of Civil Procedure, Sec.* 2.

Failure in a suit of simple ejectment does not bar a subsequent suit for redemption, notwithstanding that the defendant had asserted the existence of his mortgage in the former suit.

THIS was a special appeal from the decision of Edward Cordeaux, Assistant Judge at Puná, reversing the decree of the Subordinate Judge of Puná.

The material facts are sufficiently stated in the judgment.

The special appeal was heard by WEST and LARPENT, JJ.

*Bahiravnáth Mangesh* for the special appellant :—The suit which the plaintiff's father in February 1866 filed against the father of my client, Vináyak, was brought with the object of removing his obstruction and recovering possession of the house in dispute. In form it was an ejectment suit, but from the first Vináyak grounded his defence on his mortgage, of which therefore the plaintiff's father had full knowledge. In *Soorjomonee Dayee* v. *Suddánund Mohápatter* (*a*) their Lordships of the Privy Council, adverting to Section 2 of the Code of Civil Procedure, lay down " that the term '*cause of action*' is to be construed with reference rather to the substance than to the form of action" (*b*). Further on their Lordships go on to say " It has probably never been better laid down than in a case which was referred to in the 3rd volume of Atkyns, *Gregory* v. *Molesworth*, in which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between the parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the

(*a*) 20 Calc. W. R. 7 Civ. Rul. (*b*) P. 389.

greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the *Duchess of Kingston*. If the plaintiff's father had more than one title to depend on, he was bound to bring them all forward in the previous suit, as was held by the Bengal High Court in *Dudsar Bibee* v. *Shakir Burkundáz* (c). He cannot be allowed to keep back one, and then, years after, to bring a fresh suit on the ground that he had still a right in reserve : *Brojo Láll Roy* v. *Khettur Náth Mitter* (d).

*Dhirajlál Mathurádás*, Government Pleader, for the special respondents :—Our father's suit was one for ejectment ; our present suit is to redeem as mortgagors. The causes of action are entirely different, and there is no objection to the present suit being maintained. It was held in *Bhisto Shankar Pátil* v. *Rámchandra R. Jahágirdar* (e) that the second suit being based on a different cause of action from the first, was not barred. The defendant relies on *Soorjomonee Dayee* v. *Suddánund Mohápatter* (f) ; but there the same question had been really adjudicated on previously. In *Hunter* v. *Stewart* (g) Lord Westbury said : "No case was cited at the bar, nor have I been able to find any in which a decree of dismissal of a former bill has been treated as a bar to a new suit asking the same relief, but stating a different case, giving rise to a different equity." With regard to the case of *Dudsar Bibee* v. *Shakir Burkundáz* (h), I submit it is bad law.

The following cases were also referred to in the course of the argument :—

*Sreemuthoo Raghoonadhá Perya Oodyá Tavar* v. *Khattama Nauchear* (i) ; *Vairicharlá Surya Naráyaná* v. *Nadiminti Bhagávat Patánjali* (j) ; *Shri Shri Shri Rámá-*

(c) 15 Calc. W. R. 168 Civ. Rul. (d) 12 *Idem*. 55. Civ. Rul.
(e) 8 Bom. H. C. Rep. 89 A. C. J. (f) *Vide Supra*.
(g) 8 Jur. 317 S. C. 31 L. J. (N. S.) Ch. 346, see p. 350. (h) *Vide Supra*.
(i) 10 Calc. W. R. 1, P. C. (j) 3 Mad. H. C. Rep. 120.

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*chandrá* v. *Darvádá Rámáná Chándiri* (*k*); *Gopaláyyan* v. *Raghupáti Ayyán* (*l*); *Chiniyá Mudáli* v. *Venkatá Chellá Pillái* (*m*); *Doorga Churn* v. *Kassy Chunder Moitree* (*n*); *Kádir Buksh* v. *Golám Ali* (*o*), and *Sadu bin Mánáji* v. *Báizá kom Mánáji and another*. S. A. 361 *of* 1873, decided by MELVILL and NA'NA'BHA'I, JJ., on the 1st of April 1874.

*Báhiravnáth*, in reply, referred to the following additional authorities:—*Mohidin* v. *Muhammad Ibrákim* (*p*) and *Maktum valad Mohidin* v. *Imám valad Mohidin* (*q*).

WEST, J.:—The plaintiffs' father Bábáji, having purchased the rights of one Datto at an execution sale on a money-decree, sought to obtain possession of the house he had bought as Datto's. When this house had been attached by the judgment-creditor, Vináyak, the defendant's father, who was in possession, had endeavoured to raise the attachment on the ground that he held under a deed of mortgage and conditional sale, which had long ago become absolute. His application was disallowed on the ground that his rights as mortgagee would not be affected by the sale of Datto's interest in the property. Vináyak was not satisfied with this order, and brought a suit against Datto's judgment-creditor and Bábáji, who had meanwhile become the purchaser in execution, to establish his right to the house. The final decision in this suit rested on the grounds, first that Vináyak had not established the mortgage and conditional sale, on which he relied, as the contractual basis of his right, the document, adduced by him as evidence of the transaction, being inadmissible because unstamped, and secondly, that he had failed to make out a title by prescription through *bonâ fide* possession as owner for 30 years.

In this position of affairs, Bábáji, having tried in vain to get possession of the house under Section 269 of the Code of Civil Procedure, instituted a regular suit for the eject-

(*k*) *Idem.* 207. (*l*) *Idem.* 217. (*m*) *Idem.* 320.
(*n*) Marshall 539. (*o*) 9 Calc. W. R. 90 Civ. Rul.
(*p*) 1 Mad. H. C. Rep. 245. (*q*) 10 Bom. H. C. Rep. 293.

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ment of Vináyak. By the Munsiff his title was found proved, and this adjudication was confirmed by the Joint Judge in Regular Appeal, on the ground that the title set up by Vináyak had been conclusively pronounced against by the decree in the previous suit. On a special appeal, however, being made by Vináyak's son, Shridhar, the High Court reversed the judgments of the courts below, on the ground that though Vináyak had failed in the previous suit to establish an adverse possession against Bábáji's predecessor in title extending to 30 years, yet the decision showed that he had been in possession for more than 12 years, which was sufficient to raise a bar to Bábáji's suit according to the provisions of the Limitation Act. It was undoubtedly an erroneous application of the principle of *res judicata* when the Joint Judge made Vináyak's failure, as plaintiff, on the particular ground of right selected by him, a reason for denying that he could have any right at all as against his former defendants; but according to our view, it was perhaps an oversight when from the negative judgment that Vináyak had not been in possession for 30 years, the late learned Chief Justice of this Court deduced the affirmative conclusion as binding on the parties that Vináyak had been in possession for more than 12 years. The question and the sole question as to length of possession in the previous suit had been whether it had continued for 30 years. The defendant was not concerned to prove that it had not lasted for 13 or even for 29 years, and the decision of the Court was *res judicata* only as to the particular point in issue.

The defendant, Vináyak, or his son, Shridhar, could probably, as a matter of fact, have proved his adverse possession for more than 12 years, had such proof, according to the view of the District Court, been useful, or had it not, according to that of the High Court, been superfluous. He had been in possession for many years, and there was no document of title presentable in a Court, to which his possession could be referred. But on the day on which the judgment of the Court of first instance was delivered,

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Vináyak having got his original mortgage of 1830 stamped, filed it in support of his defence. It had thus become admissible in evidence, but could not properly be used in that suit not having been produced at the proper time, and the case was disposed of without reference to it. But by stamping his mortgage, Vináyak, at the same time that he made it a defence of his possession, if he should fail on other grounds, created a new right for Bábáji and his representatives. They, according to the received construction of Regulation XVIII. of 1827, Section 14, were third parties, against whom, as purchasers of the equity of redemption, the mortgage became an effectual instrument from the date on which it was stamped. Having failed in their suit for dispossession of Shridhar as in without any title, Bábáji's sons now seek to redeem the mortgage, which Shridhar himself has made the basis and limit of his rights.

The contention for the defendant Shridhar now is that as he from the first asserted a mortgage with a clause of conditional sale as the foundation of his right, Bábáji was fully apprized of his case and was bound in the former suit to bring forward every circumstance, by which his own claim to possession could be supported, and of which he was at the time aware. This view prevailed with the Subordinate Judge, who held that the present suit for redemption was barred by Section 2 of the Code of Civil Procedure. The Assistant Judge, on the other hand, considering the cause of action to be quite distinct in this suit from that in the previous one, reversed the judgment of the Subordinate Judge. It is against this reversal that appeal is now made.

The principle of *res judicata*, simple enough in its statement, is one that seems to present considerable difficulty in its application. We have according been referred to a great number of decisions of the Hight Courts, which it would be hard, perhaps impossible, to reconcile in all respects with each other. The principal variances have arisen from different views of what did not or did constitute for the

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purposes of a second suit a ground of right identical with the one relied on in a previous suit between the same parties. In the case of *Dadsar Bibee* v. *Shakir Burkundáz and others* Bayley and Mitter, JJ., ruled that after suing as a donee, the plaintiff could not sue again for the same property as heir. His whole title, whatever it might be, ought, those learned Judges thought, to have been brought forward at once. The same view is taken in *Brojo Lall Roy* v. *Khettur Náth Mitter*, and that all the grounds of suit must be brought forward at once is repeated in *Premánand Gossáme* v. *Ram Churn Deb and another* (*r*). On the other hand, Lord Westbury's *dictum* in *Hunter* v. *Stewart*, that knowledge of a second ground of right, when a first one is relied on in a suit, does not prevent that second ground being afterwards made the basis of a second suit seeking the same relief as the first, has been fully adopted by this Court in *Bhisto* v. *Rámchándra*, and has been recognized in other cases. In the case of *Woomatárá Debiá* v. *Unnopoorna Dássee* (*s*) the Privy Council may at first sight seem to have departed from the principal enunciated by Lord Westbury, but there the whole cause of action was considered as having arisen out of the decision of the revenue authorities. The transaction between the parties had been such as for juridical purposes should properly be regarded as one, and on that one transaction several suits between the same parties could not proceed. As is said by Cleasby, B., in *Death* v. *Harrison* (*t*) "though the particular claim.....was not in controversy [in the previous suit], the subject-matter, out of which it arose, was," and in such circumstances the allowance of repeated suits would lead to vexatious litigation. In the case of *Stevens* v. *Tillett* (*u*), Willes, J., says that "matter in respect of which no evidence was given on the former occasions may be inquired into," and the matter must be regarded as essentially different when it did not originate in the same transaction and when it constitutes, as averred, a

(*r*) 20 Calc. W. R. 482 Civ. Rul. (*s*) 11 Beng. L. R. 158.

(*t*) L. R. 6 Exch. 15, see p. 19. (*u*) L. R 6 C. P. 147, see p. 174 *ad fin.*

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wholly different right in the plaintiff giving rise to a different duty on the part of the defendant. In Special Appeal 488 of 1873 it is said that a plaintiff, suing for ejectment, cannot in that suit obtain a decree for redemption of a mortgage, of which he had notice when he filed his suit, but it is not said that he is debarred from enforcing redemption in another suit. The relative rights and duties of owner and trespasser on the one hand and of mortgagor and mortgagee on the other are wholly different, and failure in a suit of simple ejectment does not in our opinion in any way bar the plaintiff in a subsequent suit to enforce his right to redeem as mortgagor. Least of all can this be so when the mortgage being in the defendant's hands was not at the institution of the previous suit stamped so as to be a valid instrument, though subsequently it has acquired validity.

We, therefore, confirm the decree of the Assistant Judge with costs.

*Decree confirmed.*

[APPELLATE CRIMINAL JURISDICTION.]

*Criminal Reference No.* 149 *of* 1874.

1874. November 12

REG. *v.* MA'NIKRA'M SURAJRA'M.

*Bombay Survey and Settlement Act No. I. of* 1865., *Sec.* 14—*Bombay Act IV. of* 1868, *Sec.* 15—*Notice to produce evidence—Penalty for disobedience to notice to produce evidence.*

To render a person liable for disobedience of a notice under Section 15 of Bombay Act IV. of 1868, it is necessary that the documents required for inspection should be therein specified.

Disobedience of an order to produce evidence under Section 14 of Bombay Act I. of 1865, cl. 1, does not render a person liable to criminal prosecution, but simply to an adjudication in his absence.

THIS was a reference from H. M. Birdwood, Acting Session Judge of Surat, under Section 296 of the Code of Criminal Procedure.

The accused was convicted under Section 174, Indian Penal Code, by the Second Class Magistrate of Chorási, of disobedience to a summons to produce evidence, and sentenced to pay a fine of Rs. 5.

A notice dated 22nd June 1874 was issued by Mr. Enti, Deputy Collector and Inquiry Officer, Surat, requiring the accused person's appearance, either personally or by agent, "with evidence," at his office on a certain day. The accused person not having appeared, Mr. Enti sanctioned a criminal prosecution.

Mr. Birdwood was of opinion that the conviction was illegal, 1st, because there was no evidence to support it; 2ndly, the notice was defective for want of specification of the documents required for inspection, or—if held to have been issued under Section 14 of Bombay Act I. of 1865—the penalty for disobeying it was not a criminal prosecution, but an adjudication *ex-parte*; and 3rdly, that there was no evidence to prove that the notice had been duly served.

The reference was heard by WEST and PINHEY, JJ.

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PER CURIAM: If the facts proved and found had shown that the accused was called on to produce specific documents, and had failed to produce them, then the provision of Section 15 of Bombay Act IV. of 1868 would have been applicable; but the Magistrate's proceedings show that no such specific call was made on the accused, and, therefore, the only penalty which he incurred was that of an adjudication in his absence under Clause 1 of Section 14 of Bombay Act I. of 1865. Consequently, without considering the question raised by the Sessions Court, viz., whether there was evidence sufficient to warrant a finding that the notice was duly served on the accused person, the conviction and sentence must be reversed.

*Conviction and sentence reversed.*

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[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No.* 218 *of* 1874.

November 16.

NINGANGAVDA' PA'TIL.....*Plaintiff and Appellant.*

SATYANGAVDA' PA'TIL.....*Defendant and Respondent.*

*Civil Procedure Code, Sec.* 15—*Declaratory Decree—Consequential relief—Act XI. of* 1843—*Patil—Suit for declaration of plaintiff's eligibility to the office of Pátil.*

Where a plaintiff sued for a declaration of his eligibility to the office of *Patil*, if elected under the provisions of Act XI. of 1843, he having been obliged to sue to establish his eligibility in consequence of the defendant's persistent denial of the plaintiff's claim to such eligibility, whereby the revenue authorities were induced to refuse to recognise it:

*Held* that the suit was cognisable by a Civil Court.

*Held* also that such a suit would lie, even when the object of it was only to enable the plaintiff to influence the revenue authorities by showing that the Civil Court had declared him eligible for office as *Patil*:

*Abáji Sankroji* v. *Niloji Báloji* (2 Bom. H. C. Rep. 342) and *Yesáji Apáji* v. *Yesáji Mhálaji* (8 Bom. H. C. Rep. A.C.J. 35) distinguished.

THIS was a special appeal from the decision of N. Daniell, Acting Judge at Dharwar, reversing the decree of Shrinivás Krishná, Subordinate Judge of Gadak.

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NINGANGAVDA' PA'TIL v. SATYANGVADA' PA'TIL.

This suit was instituted by Ningangavdá for the purpose of establishing his right to officiate as *Pátil* of the village of Kurhatti. He alleged that he, the defendant Satyangavdá, and one Makangavdá were full brothers, and that they each had a right to officiate as *Pátil* in turn, but that in 1869 the defendant took objection to the plaintiff's right so to officiate, in consequence of which objection the revenue authorities refused to recognise his claim to the *Pátilship*. The defence chiefly was the denial of the plaintiff's right to the *Pátilship*, and that the action could not be maintained in the civil court, as the power to nominate to the office of *Pátil* when not exercised by the sharers, was vested absolutely in the Collector. The Subordinate Judge, Ráv Sáheb Shrinivás Krishna, held the plaintiff's claim proved, and declared him entitled to officiate as *Pátil*, as prayed for. In appeal, however, that decision was reversed by Mr. Daniell, on the preliminary ground that such an action was not maintainable in the civil court.

He observed :—

" The first point for decision is :—Has this Court or the lower court jurisdiction in this matter ? This action is for a declaratory decree that the plaintiff is entitled to officiate as *Pátil* of his village, and the Vakil for the respondent (plaintiff) represents that the consequential relief derivable from the decree sought will be a revision by the revenue authorities of their order refusing to recognise his right. It is not disputed by the appellant (defendant) that the respondent is a sharer in the *watan*, although there is a denial that he has a right by origin to a specific share in the property, according to the appellant and other near relatives, the respondent having been adopted by a distant member of the family, whose share is less than the share of the appellant. * * *. The Collector's order is Exhibit No. 50 in evidence; from it I gather that the Collector rejects the respondent's claim to officiate, not on the ground that he does not belong to the *watandár* family, but on the ground that he has never officiated. * * * I cannot see that any consequential relief can accrue upon a decree in accordance

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with the plaint. The Vakil for the respondent wishes me to try and decide the question of adoption, but this is not a question at issue as affecting the title to officiate, and I must decline to entertain it. I must follow the rulings in *Yesáji Apáji* v. *Yesáji Mháloji* (*a*) and *Abáji* v. *Niloji* (*b*). Were the suit to establish a right to share in the *watan* which had been ignored, consequential relief might follow a favourable award; but it has never been denied that the respondent is a sharer, and any decision of mine according to the terms of the plaint would not advance the respondent's claim to officiate. I must decide on the issue that this Court and the lower court have not jurisdiction. The decree of the lower court is reversed, and the claim is dismissed with costs."

The special appeal was argued before WEST and PINHEY, JJ., on the 16th November 1874.

*Janárdhan Sakhárám Gádgil* for the appellant:—The sole question is whether a civil court has jurisdiction in such a case. The cases cited by the District Court do not apply, as they relate only to *Vadil*, which is not recognised by Act XI. of 1843. The right to sue for such a declaration as is now sought has been recognised by this Court:—R. A. No. 57 of 1871 (*Yellappágavdá* v. *Ningavá*), decided 13th March 1872, by MELVIL and KEMBALL, JJ. (*c*); R. A. No. 72 of 1871

(*a*) 8 Bom. H. C. Rep. A.C. J. 35. (*b*) 2 *Idem* 342.

(*c*.) The following extracts from the judgment of the Court bear on the point:—

"It is proved, and is, indeed, admitted, that the plaintiff is an equal sharer with the first defendant, and there is nothing in the evidence to rebut the presumption arising from this equality, or to prove the first defendant's exclusive right to officiate. It appears that until recently the *Inámdár* appointed any sharer in the *watan* who paid him the highest *nazaráná*. Under this system, the plaintiff has occasionally been appointed. There is, therefore, no proof of any recognised family custom, by virtue of which the elder branch of the family has alone officiated.

"We think that the plaintiff should have a declaratory decree that the first defendant's branch of the family has not any exclusive right to officiate, and that the plaintiff is entitled, as an equal sharer with the first defendant,

(*Nangangavdá* v. *Malapágavdá*), decided 17th June 1872 by LLOYD and KEMBALL, JJ. (*d*); R. A. No. 73 of 1871 (*Venktesh* v. *Shivsangappá*), decided 24th June 1872, by LLOYD and KEMBALL, JJ. (*e*); and R. A. No. 74 of 1873 (*Hanmantgavdá* v. *Mhirangavdá*), decided 21st September 1874, by WEST and NA'NA'BHA'I HARIDA'S, JJ. (*f*).

to any privileges which Act XI. of 1873, or any other Act defining the rights of sharers in such *watans*, confers upon the sharers, including the right to officiate as *Pátil* if duly appointed. We cannot give him a more definite decree than this, for we cannot compel the Collector to recognise the nomination of the plaintiff by the sharers, should such nomination be made, nor to appoint him if the sharers should make no nomination."

(*d*.) The part of the judgment bearing on the question is as follows :—

"With respect to the second issue, it has been found by the lower court that the plaintiff is entitled to an eight annas' share of the *watan*, and this finding is not now questioned, and as the right to officiate as *Pátil* naturally appertains to the *watán*, and it has not been shown that the first defendant enjoys any special privilege to officiate in perpetuity to the exclusion of other sharers, we consider that we are justified in granting the declaratory order sought for, though it is not the province of this Court in any way to control the power of appointment which the Collector possesses under Act XI. of 1843."

(*e*.) The material part of the judgment is the following :—

"It is not denied that the plaintiff is in possession of the lands appertaining to the *Pátilship*, and as the right to officiate as *Patil* is incidental to the possession of the *watan*. and the defendant has failed to show any exclusive right to officiate in the office, he is, we find, entitled to the declaratory decree sought for, and we, therefore, reverse the decree of the court below, and declare the plaintiff entitled to officiate as *Pátil*, though this decree will not in any way, affect the power of the Collector under Act XI. of 1843."

(*f*.) The following is the judgment :—

"WEST, J.:—The position of the plaintiff as a member of a *watandár* family is admitted. The presumption with reference to such a family is that all the members of all the branches have a right to their turns of office in succession. This presumption in the present case is not rebutted by the long tenure of office by the father of defendant No. 1, because such a tenure of office was not inconsistent with the right of the plaintiff's branch to take the duties in their turn. It is not proved that the office descended even for one generation exclusively in the branch to which defendant No. 1 belongs : all that appears is that he has come in after his father, and his succession is disputed. The selection of his father by the then *Inámdár* in 1817 proves nothing in favour of an exclusive right confined to his branch : it was quite consistent with the existence of those rights diffused throughout the family, which generally subsisted, and which the British Government made the basis of the arrangements provided for by Act XI. of 1843. We, therefore, confirm the decree of the Assistant Judge with costs."

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NINGANGAV-DA' PA'TIL v. SATYANGAV-DA' PA'TIL.

[WEST, J., referred to *Sadat Alikhan* v. *Khajeh Abdul Gani* (*g*).]

*Shivshankar Govindrám* for the respondent:—The decisions cited for the plaintiff were passed before Act XXIII. of 1871 came into operation. Sections 3 and 4 of that Act prevent suits such as this being entertained.

PINHEY, J.:—We are of opinion that the District Court was in error in refusing to consider this claim on its merits, on the ground that the civil court has no jurisdiction over the subject-matter of this suit. The cases cited by the District Court in support of its judgment, *Abáji Sankroji Bhonsle* v. *Niloji Báloji Bhonsle* (*h*), and *Yesjái Apáji Pátil* v. *Yesáji Mhálaji* (*i*) are not in point. In both those suits the plaintiffs sought to be declared *Vadil*, or elder among the holders of a *Pátilki watan*, but as the position of *Vadil* amongst *watandárs* is not recognized by Act XI. of 1843, and, therefore, a declaration by the Court as to who is *Vadil* among a family of *watandár Pátil* would not in any way entitle a person to claim the office of *Pátil* to the exclusion of other members of the family, nor even establish any preference in his favour, the Court, in both the cases cited, declared that the claim would not lie, as upon such declaration no consequential relief could be given. The ground of the decision, so far as the claim was brought for the purpose of influencing the Collector, is very particularly noticed in the earlier of the two cases, that in the 2nd volume.

The claim of the plaintiff in the present case is altogether different. In this case, the plaintiff seeks to get a decree, declaring his eligibility to the office of *Pátil*, if elected under the provisions of Act XI. of 1843; and he has been obliged to sue to establish his eligibility, because his claim to be eligible has been persistently denied by the defendant, and the objections taken by the defendant have induced the revenue authorities to refuse to recognize his eligibility

(*g*) 11 Beng. L. Rep. 227 (P.C.) (*h*) 2 Bom. H.C. Rep. 342.

(*i*) 8 *Idem*. A.C.J. 35.

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That such a suit is cognizable by a civil court has been repeatedly recognized by the decisions of this Court (it is only necessary to refer to Special Appeal 57 of 1871, decided 13th March 1872, and Regular Appeal 73 of 1871, decided 24th June 1872, and Regular Appeal 74 of 1873, decided 21st September 1874): and that such a suit will lie, even when the object of it is only to enable the plaintiff to influence the revenue authorities by showing that he has been declared by the civil court eligible for office as *Pátil*, is further supported by the remarks made by their Lordships of the Privy Council in *Sadat Alikhan* v. *Khajeh Abdul Gani*.

We, therefore, reverse the decree of the District Court, and remand the case to the District Court for retrial on its merits. Costs to follow the final decision.

*Decree reversed and case remanded.*

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[APPELLATE CRIMINAL JURISDICTION.]

## REG. *v.* DEVA' DAYA'L.

November 23.

*The Code of Criminal Procedure, Section 346—Prejudice.*

An accused person whose signature to a statement made by him to the committing Magistrate is not taken, as provided in Section 346 of the Code of Criminal Procedure, is not prejudiced thereby within the meaning of that section, unless he is unfairly affected as to his defence on the merits.

Where a prisoner in the Court of Session was represented by a pleader who had opportunity to object to the admissibility of his statement, and did not, the High Court held that he was not prejudiced.

THE accused Devá Dayál was tried by J. W. Walker, Acting Session Judge of Ahmedabad, for the murder of his wife, Jamná, and sentenced to death.

The accused made a confession of his guilt to the Third Class Magistrate at Dholká on the day that Jamná was found dead, and he admitted the confession of the offence before

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the committing Magistrate, but withdrew it before the Session Judge. The Judge was of opinion that the facts of the case bore out the confessions made by the accused, and established the charge of murder.

The appeal and the reference for confirmation of the sentence of death were heard by WEST and PINHEY, JJ.

*Shántárám Náráyan* for the appellant:—The confession of the accused is not made as directed in Section 346 of the Code of Criminal Procedure. A *kárkun* of the committing Magistrate appears to have written the prisoner's name, but the accused himself has neither signed his name nor made his mark. In the absence of these pieces of pre-appointed evidence, the prisoner must necessarily be considered as prejudiced, for a doubt remains as to the genuineness of the statements.

Mr. Shántárám then commented on the evidence.

*Dhirajlál Mathurádás*, Government Pleader, for the Crown:—The prisoner is not prejudiced. The meaning of what is prejudice within the meaning of Section 346 of the Code of Criminal Procedure may be gleaned from a comparison of it with Section 447.

WEST, J. (in delivering judgment said):—It has been urged upon us by the accused's Pleader, Mr. Shántárám Náráyan, that the statement of the accused, taken before the committing Magistrate, is inadmissible in evidence, inasmuch as it does not bear the signature of Devá Dayál, as directed by Section 346 of the Code of Criminal Procedure. "The signature of *A. B.*, the accused, in the hand-writing of *C. D.*," which is what appears in this case, has been held not to meet the requirements of that section. The question, therefore, is whether this defect has "prejudiced" the prisoner, for if it has not, then, as provided in the last paragraph of that section, it cannot be deemed to affect the admissibility of the statement recorded.

We are of opinion that the meaning of the word "prejudiced" in this section is "unfairly affected as to his defence on the merits." The intention of the whole para-

graph in which this word occurs is to remedy defects of a formal character, which may have arisen through inadvertence or neglect on the part of the Magistrate, and which defects the law, and, the Legislature think, ought not to be made the means of culprits escaping the just penalties of his crime. As the examination of the accused person, taken in the preliminary inquiry, may be proved to have been duly made, though not regularly and formally recorded, a defect in such record is not sufficient to exclude it, and the inquiry may be forgone, if no objection is made, and it appears that the defect has been of a kind which does not really affect the merits, and is one which would be remedied by the examination of the Magistrate, or some one who was present.

In the present case the prisoner was represented by a professional gentleman, who, we must suppose, was reasonably well acquainted with the law. As an objection existed on the ground of the want of the proper signature of the prisoner to the document, it is right to suppose that he would have taken it, if he had thought leaving the error uncorrected would have operated unfairly against his client. His not taking this objection shows that, to his consciousness, the defect was purely formal, or that he considered that it would be at once remedied by the examination of a person present when the statement was made.

We must lastly refer to Section 167 of the Indian Evidence Act and Section 283 of the Code of Criminal Procedure. No decision is to be upset for a defect which has not prejudiced the prisoner in his defence. In order that an Appellate Court may be asked to act upon an objection of this kind, it is necessary that it should have been taken before the lower court. It was not taken in this case, and it cannot, in strictness, be claimed that it be entertained by us now. Had the prisoner been unrepresented in the Court of Session, we might possibly have felt it within our competence to make a relaxation in his favour; but the fact that he was represented, and that his pleader did not take the objection, leads us to the inference that the latter did not

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consider that it would benefit his client. Upon the whole, therefore, we think the prisoner was not prejudiced.

The Court declining to confirm the sentence of death, passed upon Devá Dayál a sentence of transportation for life.

*Order accordingly.*

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NOTE.—See *suprá* p. 44, the case of Reg. v *Dayá Anand and another*, in which the Court (West and Nanabhai Haridás, J.J.) held that a similar confession should not have been admitted. In that case, however, it does not appear that the prisoners were professionally represented in the Session Court.—ED.

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November 23.

[APPELLATE CRIMINAL JURISDICTION.]

REG. *v.* CHA'ND NUR AND PIRBHA'I A'DAMJI.

*The Code of Criminal Procedure, Section* 457—*Conviction of an offence without a specific charge.*

When a person is charged with an offence consisting of parts, a combination of some only of which constitutes a complete minor offence, he may, under Section 457 of the Code of Criminal Procedure, be convicted of the latter without being specifically charged, but only when the graver charge gives notice of all the circumstances going to constitute the minor offence.

Hence, where a man charged with murder was convicted of abetment of it, the High Court annulled the conviction and sentence, and ordered him to be retried on the latter charge.

THE accused Chánd and Pirbhái were both tried by W. H. Newnham, Session Judge of Ahmedabad, on a charge of murder; but while the former was convicted of the offence charged, the latter was found guilty of abetment of murder. Both, however, were sentenced to death.

The material facts of the case are as follows :—

Chánd, at the instigation, it is said, of Pirbhái, put some poison into a mill belonging to one Rájebhái (an enemy of the latter), in consequence of which Rájebhái narrowly escaped death, while his two sons actually died. Mr. G. B. Reid, Magistrate, First Class, committed both those persons on a charge of murder, on which they were tried by Mr. Newnham, who, finding on the evidence that Pirbhái was not present at the commission of the offence, found him guilty of abetment of murder only, without making any amendment

in the original charge. He was of opinion that Section 457 of the Code of Criminal Procedure warranted this being done.

The appeal was heard by WEST and PINHEY, JJ.

*Shántárám Náráyan*, for the appellants, commented on the evidence.

*Dhirajlál Mathurádás*, Government Prosecutor, for the Crown, was called on to support Pirbhái's conviction of abetment of murder, on a charge of murder itself.

WEST, J. (after reviewing the evidence as regards the prisoner Chánd, and finding him guilty of murder), proceeded thus :—As to the case against Pirbhái, we are of opinion that Section 457 of the Code of Criminal Procedure has been misapplied. That section applies to cases in which the charge is of an offence which consists of several particulars, a combination of some only of which constitutes a complete minor offence. The graver charge in such a case gives to the accused notice of all the circumstances going to constitute the minor one of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when this is not the case, where the circumstances, embodied in the major charge, do not necessarily, and according to the definition of the offence imputed by that charge, constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter. The section is not intended to apply to a collateral offence. It is not open to a court to find a man guilty of the abetment of an offence on a charge of the offence itself. When a man is accused of murder, he may not be conscious that he will have to meet an imputation of collateral circumstances constituting abetment of it, which may be quite distinct from the circumstances constituting the murder itself. When, therefore, the Session Judge says that Section 457 warrants his convicting the accused of the abetment of murder on the original charge of murder itself, without amendment of the charge, he departs from the intention of that section. For

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although, under special circumstances, abetment is to be deemed equivalent to the principal offence, yet it is plain that a charge of the latter, simply as such, gives no intimation of a trial to be held on the former. We must, therefore, annul the conviction and sentence passed upon Pirbhái, and direct that he be retried on a charge of the abetment of murder.

*Order accordingly.*

Dec. 3.

[APPELLATE CRIMINAL JURISDICTION.]

## REG. v. JORA' HASJI, BHA'IJI RUPSANG, AND BHOGHA' PIRA'.

*Statements made by prisoners during Police custody—Sec. 27 of the Indian Evidence Act I. of 1872.*

Under Sec. 27 of the Indian Evidence Act not every statement made by a person accused of any offence while in the custody of a Police officer, connected with the production or finding of property, is admissible. Those statements only which lead immediately to the discovery of property, and, in so far as they do lead to such discovery, are properly admissible. Whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it and the statements made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible. Other statements connected with the one thus made evidence, and thus mediately, but not necessarily or directly, connected with the fact discovered, are not admissible. That a witness says that a plan was prepared in his presence is not a sufficient reason for admitting the plan in evidence, unless the witness also says that to his own knowledge the plan is correct.

THE three accused were tried and convicted of the murder of one Lallu, and sentenced to death by W. H. Newnham, Session Judge of Ahmedabad.

The facts of the case are briefly these :—

Lallu disappeared from his village at the beginning of September last. On a search being made, a quantity of human bones and two cloths were found in a field within the limits of the village of Baithal, and the three accused were sent for by a chief constable on suspicion. The accused Bhogá produced a bill-hook and a knife from a field ; the accused

Jorá produced a stick; and the two showed the scene of murder together, which was also pointed out the next day by the accused Bháiji.

Each of the three accused made a statement exculpating himself but criminating his two fellow-prisoners. The Sessions Judge held those statements admissible against all, and relying upon them, as well as the other evidence in the case, convicted the accused. [The rest of the facts appear in the judgment.]

The appeal was heard by WEST and PINHEY, JJ.

*Nagindás Tulsidás* for the appellants. The Judge was wrong in taking into consideration the statement of each of the prisoners against the others.

*Dhirajlál Mathurádás*, Government Pleader, for the Crown.

WEST, J.—The three prisoners have been convicted by the Session Judge of Ahmedabad of the murder of one Lallu, and sentenced to death.

In the investigation of the case before the Court of Session some defects have occurred, which we think it necessary to notice at the outset, although it is not needful to say in each instance to whom those defects are properly ascribable.

In the first place, there is no evidence that the bones sent by the Chief Constable for examination by the Civil Surgeon are the bones that were examined by him. It appears that the Surgeon, on taking up his office, found that certain bones had been sent, and were awaiting examination; but the link connecting them with those sent by the Chief Constable is wanting; and we are thus obliged to throw out of our consideration this very important piece of evidence. The person who received the bones at the hospital, and, in fact, every person through whose hands they passed, from the time they left the hands of the Chief Constable, down to the time they reached those of the Surgeon, should have been examined without a single break.

We also find that a good deal of evidence has been admitted against the accused to prove what occurred at the

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hedge where the bones were found, and elsewhere in the fields where the murder was said to have been committed, which ought legally to have been excluded. As a general rule, the law renders statements made by people while in the custody of the police inadmissible. But to that rule is appended a qualifying exception. Section 27 of the Indian Evidence Act has enacted that "when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." Under cover of this provision we find introduced into this case the discovery of a bill-hook, a knife, and a stick, in order to open the door to admit statements made by the accused when they must have been in the custody of the police.

It is of the highest importance that the law on this point should be accurately known by the courts below as well as the professional gentlemen who practise there. It is not all statements connected with the production or finding of property which are admissible; those only which lead immediately to the discovery of property, and so far as they do lead to such discovery are properly admissible. Whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it and the statement made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible. Other statements connected with the one thus made evidence, and so mediately, but not necessarily or directly, connected with the fact discovered, are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against unfair practices on the part of the police.

For instance, a man says: "You will find a stick at such and such a place. I killed Rámá with it." A policeman,

in such a case, may be allowed to say he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible. If, instead of "you will find," the prisoner has said, "I placed a sword or knife in such a spot," when it was found, that, too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus distinctly and independently of any other statement connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement, as it has not furthered, much less caused, the discovery, is not admissible. The words in Section 27 of the Evidence Act "whether it amounts to a confession or not" are to be read as qualifying the word "information" in the immediately preceding context, not the words "so much"; and the effect is that, although ordinarily a confession of an accused while in custody would be wholly excluded, yet if, in the course of such a confession, information leading to the discovery of a relevant fact has been given, so much of the information as distinctly led to this result may be deposed to, though as a whole, the statement would constitute a confession which the preceding sections are intended to exclude.

In this case, as in many others, the production of articles, supposed to have been made use of in committing the murder by the prisoners, is adduced as strong evidence against them. The conduct of a prisoner in relation to any relevant fact is good evidence according to Section 8 of the Indian Evidence Act; but according to Explanation 1, "The word 'conduct' in this section does not include statements, unless those statements accompany and explain acts other than statements." It is on such a statement that the significance of the act, which it accompanies, in many cases wholly depends; as for instance when a Police officer says to a prisoner "I must search your house for the stolen property," to which the prisoner replies: "I will give you at once all the valuables I have in the house," and then

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gives him certain articles, not stolen property, after which stolen jewels are found concealed under his hearth. But if, under cover of an explanation said to have been given by a prisoner of an act in itself ambiguous, or not so obviously connected with a fact in issue as to be relevant, it is sought to introduce a confession of a prisoner to the police, or made while in custody of the police, the Evidence Act does not warrant its admission. The rules of exclusion and the exception to them being definitely laid down, the exception is not to be extended to cases not properly falling within it. The giving up by a cultivator of a bill-hook, or the pointing out of a place where *bájri* appears to have been trampled, is however, in itself an unambiguous act. It is in general also insignificant. It needs no explanation, and a confession accompanying it does not explain it, but is a collateral matter, whose exclusion, where it is excluded, is not prevented by its being connected with matters that are not excluded.

We shall notice one other point of law which arises in the case. A plan of fields, which the Chief Constable says, he saw made before him, is admitted. To say that it was prepared in his presence and bears his signature is not a sufficient reason for admitting the plan. The witness did not depose that to his knowledge the plan was a correct one, and if he could not say this, the person who made the measurements and prepared the plan should himself have been called. We have not taken this plan into our consideration in disposing of this case, and it has not proved to be of any importance, but we mention the matter in order that our opinion regarding its non-admissibility in evidence may be known.

The remaining evidence in the case consists chiefly of statements made by the accused. Before weighing them, we will remark that if a man makes statements, he is responsible for them, even though they should not in fact be true. If he chooses, under pressure, if there be any pressure, not to appeal to the protection of the Magistrate, but to make to the Magistrate confessions which in fact are

untrue, he voluntarily incurs the risk of their being taken to be true against him. Here the accused had full opportunity to speak as they wished before the Magistrate. He has certified that their statements were voluntarily made. If the statements are not true, the prisoners themselves are to blame.

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The Court then discussed the rest of the evidence, and confirmed the convictions, though it declined to confirm the sentence of death, and passed sentences of transportation or life.

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[APPELLATE CRIMINAL JURISDICTION.]

## REG. v. FATÁ ADA'JI AND TWO OTHERS.

December 3.

*Dying Declaration.*

The declaration of a dying person, albeit made on solemn affirmation before a Magistrate, who was not, however, the committing Magistrate, and signed by him, is not admissible in evidence without legal proof that the deceased made such a declaration.

THE three accused were convicted of murder by W. H. Newnham, Session Judge of Ahmedabad. The first accused, Fatá, was sentenced to death, and the other two sentenced to transportation for life.

The facts of the case, in so far as they are material to the purposes of this report, are briefly as follows :—

The deceased Jethá, along with others, was sleeping near a cart laden with mangoes. On hearing a noise he awoke, and rousing his friends, pursued six men, who, it appeared, were making off with some of the fruit. Finding themselves hotly pursued, three of these men—who are the present applicants—turned to bay, and, as the prosecution alleges, the first accused, at the suggestion of the second, shot an arrow at the deceased, and the third accused, also at the suggestion of the second, ran towards him with a sword. On removal from the scene of the assault to Kapadvanj, the deceased is said to have made to a Second Class Magistrate, a declaration before his death, denouncing the accused as his assailants.

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Upon the evidence in the case, which it is unnecessary to notice, including this dying declaration, the Session Judge based the conviction of the accused.

The appeal was heard by WEST and PINHEY, JJ.

*Shántárám Náráyan*, for the appellants, commented on the evidence to show its insufficiency.

*Dhirajlál Mathurádás*, Government Prosecutor, for the Crown. [*West, J.*—What evidence is there in the case to show that the statement recorded as No. 6, as the dying declaration of the deceased, was actually made by him ?] There is none such. But it may be treated as a memorandum of evidence by a witness before an officer authorized by law to take such evidence. The statement is before a Magistrate on solemn affirmation, and may be admitted without proof under Section 80 of the Indian Evidence Act. [*West, J.*—The Magistrate was not the committing Magistrate, and the prisoners were not present, and had no opportunity of cross-examining the dying man.] Then this may be admitted under Section 32, clause 1 of that Act, as the statement of a deceased person, as to any of the circumstances of the transaction which led to his death. [But can you cite any authority to show that such a statement must be presumed to be genuine without evidence of its havin greally been made by the dying man ?] No.

PER CURIAM :—The Government Prosecutor has not been able to produce any authority for the admission as evidence of the document recorded as No. 6, purporting to be the dying declaration of deceased Jethá without proof or solemn affirmation that the deceased actually made such a declaration. The law does not provide that the mere signature of a Magistrate shall be a sufficient authentication of such a document, and it is obviously desirable that the person who took the statement should be subject to cross-examination as to the dying man's state of mind when he made it, and as to other circumstances. We must, therefore, exclude

this document in considering the evidence in the case. But so excluding it we find that there remains sufficient evidence on record to sustain the conviction of the first and second prisoners.

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[The Court then went into the evidence, and declining to confirm the sentence of death on the first prisoner, Fatá, sentenced him to transportation for life. It confirmed both the conviction and sentence on the second prisoner, and acquitted and discharged the third.]

*Order accordingly.*

[APPELLATE CIVIL JURISDICTION.]

*Regular Appeal No.* 50 *of* 1872.

October 10.

BHA'U NA'NA'JI UTPA'T.....*Plaintiff and Appellant.*
SUNDRA'BA'I, wife of DHONDU GOVIND.....*Defendant and Respondent.*

*Family usage—Utpát families of Pandharpur—Succession—Hindu Law.*

Among the members of the Utpát families of Pandharpur, in the Sholápur District, daughters are excluded from succession, by a long and uniform family usage.

Under Hindu law, a family usage or custom, when clearly proved, outweighs the written text of the law. But the greatest care must be exercised in accepting the alleged usage or custom as proved. When it is a family custom, the evidence must clearly show that it has been submitted to as legally binding, and not as a mere arrangement by mutual consent for peace or convenience.

Any special rule of inheritance proved to exist in a Hindu family, and which is ancient, uniform, and reasonable, and not repugnant to the fundamental principles of Hindu law, should not be refused recognition.

Origin and growth of the rights of inheritance of the widow and daughter by general Hindu Law, considered.

THIS was a regular appeal from the decision of Mahádev Govind Ránade, First Class Subordinate Judge at Poona.

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The case (*a*) was remanded by the High Court for the trial by the lower court of the two issues stated in the judgment of the court. The following is an extract from the judgment of Mr. Ránade, bearing on the second issue :—

"I now proceed to the investigation of the second point laid down in the remand order. If Purshotam Chimnáji was separated from the plaintiff, as a matter of course it follows that his daughter is his sole heir after Ramábái's death, now that the adoption of the first defendant has been set aside. Against this claim of the daughter, the plaintiffs set up a family custom, by which Purshotam and Ramábái dying without any issue or adopted son to succeed as heir, Purshotam's share lapsed to his separated kinsman, the plaintiff, and his daughter has no right to succeed to his father's share. The question is put rather too broadly in the order of remand. The question there is, 'whether, according to the custom of the country, the defendant Sundrábái, as a female, is excluded from inheriting the said property in dispute.' Now, the plaintiffs do not contend for such a broad principle of exclusion. They do not urge that there is any *custom of the country* which excludes *female heirs generally* from succeeding to such property. They plead a *family custom*, and that this family custom does not exclude *all* female heirs as such, but only *daughters*, female heirs of a different *gotra*. It is admitted by the plaintiffs that the wife, mother, or daughter-in-law of a separated Utpát succeed, on his death, to his share. Ramábái's own enjoyment for twenty years was of this sort, and so was Anpurnábái's before she adopted Purshotam. Every witness on the plaintiff's side, as well as on the defendant's, admitted that female heirs, as such, succeed, and are not excluded. The Utpát families number in all about fifty or sixty in Pandharpur, and at present there are six or seven female sharers in these *vritti*, who regularly receive their shares of the offerings, like any of the male members. Two of these female sharers, Girjábái, No. 266, and Várubái, No. 267, were examined on behalf of the defendant; and as the fact was not dis-

(*a*) See. 7 Bom. H. C. Rep. A. C. J. 153.

puted by any of the plaintiff's witnesses, the point may be said to be established that the property in dispute is not of a sort from which, by any custom of the country, female heirs, as such, are excluded. The Utpát *vritti*, as stated before, consists of the offerings before Rakhmini Devi and Rádhiká Devi, and the gifts of *yajmáns* who come to worship at the two shrines. The manner in which the fifty or sixty Utpát families manage to divide the *vritti*, is thus described by the witnesses on both sides, and this evidence removes the slight objection which otherwise might have been urged against female *purohits* or priests. The proceeds of the offerings have been farmed for the last four or five years from month to month, and the farmer, who is an Utpát himself, pays down the auction price on the last day of the month preceding that for which the farm is given. The farmer has regular lists made of all the sharers, and the ready cash, which he pays for the privilege of the farm, is divided by him among the sharers, according to their shares. None but the farmer Utpát actually officiates at the temples, except when any particular *yajmán* brings his own Utpát. Female sharers, like the male ones, have only to go to the temple on the thirtieth day of the native month, and take the portion of the cash which falls to their shares. On this point the witnesses on both sides give the same description. With regard to the second question, therefore, two points may be said to be admitted on both sides: 1st, that there is *no custom of the country* excluding female heirs from the succession; and 2ndly, that the property in dispute is not of a sort to which female sharers cannot succeed, and that female heirs, belonging to the *gotra* of the Utpáts, do succeed. The real point of contention between the parties relates to the much narrower question, whether female heirs belonging to a different *gotra*—daughters, &c.—are or are not excluded from succession to this property, not by the custom of the country, for none such is alleged, but by the usage of the Utpát families.

"There are thus two points to be considered, first, whether the evidence in this case is sufficient to establish

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such a family usage; and secondly, whether such a family usage, repugnant to the general religious law of the parties, can be upheld.

"Upon the first of these two points, the general effect of the evidence upon my mind is, that such a family usage, excluding female heirs of a different *gotra* from succession, has obtained in these Utpát families for a long period—for so long a period as the witnesses on both sides can testify from their recollection. The defendant's witnesses, one and all, admitted that, up to the moment of this suit, there has been not a single instance in which the daughter has succeeded as heir to her Utpát father's share, or has obtained her father's share by gift or will from him. The question itself, it seems, has not been raised before, so quietly has the usage been acquiesced in. * * *

"How far such a family usage, repugnant to the general religious law of the parties, can be upheld, is the next question to which I shall now address myself.

"Custom or usage occupies a prominent place in Hindu law. Manu lays it down 'that the scriptures (or the Vedas), the codes of law (or smritis), approved usage, and in indifferent cases self-satisfaction, the wise have declared are the quadruple description of the juridical system': Chap. 2, v. 12. 'Thus have holy sages, well knowing that law is grounded on immemorial custom, embraced good usage as the root of all piety (Dharm)': Achara, Chap. 1, v. 110: immemorial custom is transcendant law approved in the sacred scripture and in the codes of divine legislators. Let every man diligently observe immemorial custom: (Achara) Chap. 1, v. 108.

"More particularly, regarding the different varieties of custom, the same institute lays it down in Chap. 8, v. 46, 'what has been practised by good men and virtuous Brahmins, if it be not inconsistent with the legal customs of provinces or districts, or classes or families, let him (the king) establish.' 'All these titles of law promulgated by Manu, and (occasionally) the customs of different countries, different tribes, and different families, are described in this

code': Chap. 1, v. 118. The Yájnyavalkya institutes inculcate the same regard for the customs and usages of districts, classes, and families. Bribáspati says: 'Rules of the country, caste, or people, derived and preserved from ancient times, should still be preserved in the same way, lest people rise in rebellion.' He makes no mention of family usage. From this review, it will be seen that the Hindu law-givers regarded custom, which was immemorial, good or approved, and not repugnant to the scriptures and the institutes (for usage only occupies a third place in the enumeration of the sources of law), as having the force of law *ipso facto*, and that it did not require any judicial or legislative recognition to give it validity. The binding force of customary law has been discussed at length, and all the conflicting authorities on the subject examined in the *Khojah and Memon succession cases* (*b*), as also by the Madras High Court in *Tara Chand* v. *Reeb Ram* (*c*). In the *Khojah and Memon cases* the custom was a class or caste custom, and it was held that when such a custom has been shown to have existed from time whereof the memory of man runneth not to the contrary, and is not injurious to public interests, and does not conflict with the express written law of the ruling power, such a custom is entitled to the sanction of English courts of law, though it may be inconsistent with the dictates of the general religious law of the parties.' In the other case decided by the Madras High Court, the alleged custom was a family usage, and it was ruled that (1) though according to one school of modern jurists, for the establishment of a customary law applicable to a whole community, or a large section of it, the acts of individuals belonging to that community and illustrative of the custom must be plural, uniform, and constant, and performed with the consciousness that they spring from a legal necessity, and the custom, moreover, must not be unreasonable, (2) yet as customary law, antagonistic to the general law, can never be established by the evidence of a single family confessedly subject to that general law. The Privy Council has incidentally observed

(*b*) Perry's Or. Ca. 110. (*c*) 3 Mad. H. C. Rep. 50.

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that there does not exist in any person the power of making laws of inheritance for themselves.

"It will be seen from these quotations, that while in the case of class customs there are jurists who allow them a validity independent of judicial recognition, there is no school of jurists who recognise the power of the members of a single family, and inferentially of any number of families springing from the same source, to make a law of inheritance for themselves repugnant to the general religious law to which they are admittedly subject. It is very necessary to bear this distinction in mind between local or class customs and family usage, between *Deshāchār* and *Kulāchār*. In this presidency, this same distinction has received both a legislative and judicial recognition. Regulation IV. of 1827, Section 26, lays down that statute and regulation law must govern civil courts; when there is no statute or regulation law, the old custom of the country, in which the suit is brought, should be followed; and if there is neither statute law, nor custom of the country, then the religious law of the defendant ought to be followed in the decision of civil suits. It will be seen from this that it is the old *custom of the country* that is enjoined as a guide. English municipal law, by some historical accident, limits customs to a particular locality only. Sir Erskine Perry, in the *Khojáhs' case*, has remarked that this peculiarly municipal rule of English law (which explains the peculiar wording of the section quoted before), can have no application in India, where customs are seldom local, and are always personal ones or caste customs. Customs generally, therefore, may be divided into two classes, local or caste, or trade customs, and family customs or usages; and it will be seen, from a review of all the decided cases on the subject, that while the courts have been generally in favour of upholding the local or caste customs, even when opposed to the general religious law of the parties, they have shown a general disinclination to sanction a merely family usage which was inconsistent with the religious law of the parties. The institutes of Hindu law mention all the three kinds of customs—district

class, or family custom together—and place them much in the same rank as third in the order of the sources of law. It may reasonably be gathered from the texts that while orthodox Hindu tribunals would certainly not have upheld local or class customs opposed to the general religious law of the parties, at the same time they would have made no distinction between the usages of families and caste or local customs. But from the authorities it is plain that such a distinction has been made all along in British courts of justice, and in civil courts governed by the Regulations, as will be seen more at length from the cases cited below. The following, among others, may be cited as examples of local custom upheld, though inconsistent with the religious institutes or law of the parties. In the Broach and other Gujarát Districts, *wakf* property, which is inalienable by Muhammadan law, may be, by the custom of the district, alienated : 1 Borr., Case 27; 1 Bom. H. C. Rep. 36. In the same districts, and more especially on the other side of India, the right of pre-emption, which is based on Muhammadan law, is allowed and enforced, by custom, as between Hindus also : S. D. A Rep. 1848-50, p. 30. The law which forbids an encroachment on the privacy of a neighbour's house is based on Muhammadan law, and has been recognised, in many cases as applicable to Hindus also in particular cities of Gujarát.

"In 2 Borr., p. 38, Case No. 7, it was held that, though by the Muhammadan law there is no distinction between *watan* and other effects, the succession of an illegitimate son to a *watan* was disallowed as being opposed to the custom of the country (North Konkan). These instances may suffice to show how the courts favour local customs, even when opposed to the law of the parties. The next class of customs, caste customs—if not unreasonable or immoral—are equally favoured. The *Khojah and Memon cases*, above cited at length, furnish the best examples of this class of cases. The decision in these cases was again upheld in a late case decided by the High Court of Bombay, and reported in 2 Bom. H. C. Rep. 276. Although, in Hindu law, the

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right of divorce is marital only by the usage of particular castes, second marriage, without sufficient justification, or ill-treatment by the husband, may entitle the first wife to claim a divorce: 1 Borr., Case 22; 2 Borr., p. 524; and excommunication of the husband, for taking a second wife in marriage without consent of the first, was upheld by all the courts: 1 Borr., p. 398. In the earlier reports, there are many more such cases relating to the law of marriage, divorce, and other relations of personal status, where the caste law has been allowed to override the institutes. Of course, when any usage is plainly unreasonable or immoral, the courts have set it aside, notwithstanding that the Hindu institutes or custom sanctioned it. The Hindu law and usage both recognise the prostitute caste, but no suit lies in our courts for the wages of prostitution. The right of divorce at the pleasure of the wife claimed by the Talfide Koli caste was held to be invalid, though sanctioned by custom, as being opposed to the spirit of the Hindu law: 2 Bom. H. C. Rep. 276; 7 *ibid.* 133; 5 *ibid.* 17.

"These instances may suffice to show how the law favours caste customs, even when inconsistent with the religious law of the parties, if they are not clearly unreasonable or immoral.

"To come now to cases relating to family usages or customs, it has been held that evidence of the acts of a single family cannot establish a valid custom: 4 Bom. H. C. Rep. 113, A. C. J. A custom of primogeniture in the case of a petty Hindu family cannot be supported: 1 Bom. H. C. Rep. Appx. xlii.

"In that case the defence was that partition of the *watan* was not allowed in the family. It was held, however, that as this was not a usage of the country, but a family usage only, it could not be upheld, as being contrary to the general religious law of the Hindus. In 8 Harrington 273, a similar defence was negatived on the same ground. In 5 Moore's Ind. App. 169, 6 Moore's Ind. App. 164, it has been held that though general law may be controlled by usage, if shown to have existed for a long series of years, any petty

family cannot be permitted to set up a law for itself so as to set aside the general law.

"Such being the course of decisions on the subject of family customary law, the point for inquiry immediately before me is, whether the family usage set up in this case falls under the first class of cases or under the second, whether this usage should be upheld or disallowed.

"In this case the alleged usage is not strictly the usage of one family. It relates to about fifty or sixty sub-families, all sprung up from one common ancestor. In the case of *Taru Chand* v. *Reeb Ram*, the alleged usage was shown to have partially obtained through three generations of the common family, or rather of the several families who traced their origin from, Mr. Hughes. The fifty or sixty Utpát families all acknowledge their common relationship, and the number of sub-families is a matter of mere accident. I do not think the number of these sub-families, in any way, converts the alleged usage into a usage of a class or a caste. The Utpáts cannot intermarry among themselves, and they observe mourning for one another, at least members of each of the four great divisions among them do observe mourning. The Utpáts cannot, therefore, be looked upon as a caste or class by themselves. They do not themselves set up any such pretension. There have been only two sorts of cases of *kulachár*, or family usage recognised by the courts of law in some cases decided on the other side of India. The first class of cases are hardly exceptions from the general rule, that family customs ought not to be recognised when inconsistent with the religious law of the parties. The family custom in these cases only indicates the particular school of law which should govern the family. It has been held in 8 Calc. W. Rep. 261 Civ. Rul. that Hindu families are ordinarily governed by the law of their origin and not by the law of their domicile. In the case of a Mitákshará country family coming to reside in Bengal, the presumption is that they follow the Mitákshará law as their *kulachár* till it is shown that they have adopted the Bengal law (of Achar and Vijarahar). Many cases of this sort have been

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decided by the Bengal Courts on this principle. The other class of cases relates to the alleged usage of primogeniture in the succession of large *zemindáries*. These decisions proceed on the ground that the estate is, by family tradition and usage, of the impartible sort of what Hindu law recognises as *Ráj*. No *kuláchár* of the sort set up in the case excluding female heirs, not as females but as members of a different *gotra*, has been judicially recognised. On the contrary, there are numerous decisions where a similar usage has been negatived. In the case of the Ghotwal tenure in Bengal, reported in Calc. W. Rep. (1864), p. 39, Civ. Rul., a double *kuláchár* was set up, first, that by family custom the property descended to the eldest son, to the exclusion of other members, and 2ndly, that on failure of direct male heirs, it went to the nearest male kinsman, to the exclusion of all females. The first part of the family usage was found proved, and was accordingly upheld. The second part, though proved by some instances, was disallowed. One of the grounds on which the incapacity of female Ghotwals was sought to be supported, rested on their presumed inability to perform the personal services required of Ghotwals. It was held in that case that a female Ghotwal might succeed as heir, as personal service was not required of Ghotwals, whose ordinary duties were of a sort which might be performed by a deputy duly appointed. In our own presidency, a similar defence was set up against the claim of female heirs to succeed to the *Muzumdári watan*, and it was disallowed by all the courts. The law, as clearly laid down in 5 Bom. H. C. Rep. 202, A. C. J., recognises the right of females to hold *Muzumdári watan*, males being appointed by them to perform the services. In this case, the son of the daughter of a deceased *Muzumdár* claimed to represent him, and the Government raised the defence that female heirs could not succeed to the *watan*. It was there determined that there is nothing in the nature of the *watan*, or in the relationship of the holder to the state, which renders the succession of females impossible. In this presidency, females are entitled to succeed to hereditary district and village offices. In an early case, reported in the Reports of Selected

Cases, p. 122, the daughter's claim to succeed to the *Desáigiri* land of her father was supported, and a plea similar to the one raised in this case was disallowed. In another case, 9 Harrington, p. 425, a similar plea of family usage was set up for the defence, that the male kinsmen of the deceased who died without male issue succeeded to the property in preference to his daughter. It was held in that case by the late Sadar Court that 'the Shastra rule was the converse of this, and that the witnesses could not establish a custom contrary to the Shastra rule.' In 3 Bom. H. C. Rep. 75, A. C. J. a separated brother's widow sued for her husband's share in the *Varshásan* which was granted to the family for the performance of the worship of a certain idol. The widow's suit was allowed, as separation and performance of service in rotation by the husband's branch of the family was proved. It is true, in this case, the question of the competence of a female to perform the worship was reserved to be decided in another suit. In the present case, as stated before, this question does not arise. There are already female sharers in numbers who receive the proceeds of their shares, and the only question is whether the daughter ought to rank along with other female heirs whose claims are allowed. The property at present in dispute consists of the offerings before the idols and the proceeds of the *Purohitam* service to *yajmáns* who came to Pandharpur. Now, it has been ruled 'that hereditary priestly offices descend on failure of males through females.'. The daughter's sons were admitted as heirs in this case: 6 Bom. H. C. Rep. 250, A. C. J. The privilege of administering *purohitam* to pilgrims coming to Rámeshvar is admitted to be capable of alienation and delegation, as was decided in the case before the Privy Council, reported in 2 Calc. W. Rep. (P. C.) 21. Taking the whole of these cases together, I think the inference is irresistible that the alleged family usage cannot be sustained in this case: There is nothing in the nature of this property that should allow its descent like any other property to the heirs of the same *gotra* as recognized by law, and prevent it from being inherited by other legal heirs by reason of their belonging to a different *gotra*. It has been shown before that similar

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defences, raised on similar grounds, to the claims of daughters to succeed to *ghotwal* tenures, to the *Desáigiri* and *Muzumdari watans* and to the *Varshasáns* of priests, have been disallowed by the law courts, and I do not see that there is any peculiarity in this case which justifies me in recognising such a departure from the usual rules of the Hindu law of descent. Pleas of expediency are, of course, not such as the law courts can well recognise. But even on grounds of expediency, the question is debatable, and, on the other hand, I am certain that there is little equity in letting the daughters, many of whom in every family are unmarried or widowed, to starve from want, because they have the misfortune to lose their father. The daughter's claims upon the father's affection and estate in natural equity are certainly much stronger than those of remote kinsmen. The tacit arrangement, which had certainly for some time obtained in these Utpát families to the prejudice of the claims of the daughters, has never received judicial recognition. The daughter's right of succession, though distinctly recognised by Hindu law, has been looked upon with little favour by the people of this part of the country, and the student of the early reports will be struck with the painful struggle which female claimants had to make against all manner of pleas and defences, in spite of which this claim has now during the last fifty years obtained a general judicial recognition. In 4 Mad. H. C. Rep. 345, there is a case reported, in which the members of an undivided family, at the time of partition, agreed among themselves that the property of any one of the members or their heirs, who had no natural or adopted son, or any other issue, should not be sold or transferred as a gift, but should, on his death, be divided by the other sharers.' It was held, in a suit brought by one of these sharers to set aside a sale made by a member who died without issue, that 'an estate could not be made subject to a condition which is repugnant to any of its ordinary legal incidents, such as the power of disposition, and that such legal incident cannot be taken away by agreement.' The family arrangement, which I hold to have obtained in the present case, can have no more legal validity than this agreement of the co-sharers.

This tacit pact of the Utpáts cannot divest the estate of its legal incident—succession by the daughter after the widow—under the general canons of inheritance as laid down in all the institutes. To recapitulate what has been said on this part of the subject. Inasmuch as (1) family usage to be recognised as valid must be not repugnant to the scriptures and the institutes of law, which this is shown to be; (2) that while the Regulation enjoins only the enforcement of the old customs of the country, and by necessary inference, of castes or classes, even when inconsistent with the religious law of the parties, the present usage is not a local custom or class or caste custom, and as such, does not come under the protecting section of the Regulation; (3) that the general drift of all the authorities on the binding force of customary law is to recognise local or caste customs, but to disallow any mere family usage as to inheritance, if repugnant to the general law; (4) that there have been express decisions, in which the rights of daughters to succeed to hereditary service *watans* and offices have been upheld, and pleas of family usage, similar to those raised in this case, have been negatived; (5) that there is nothing in the nature of the property or the duties required of an Utpát, which would exclude daughters at the same time that the right of succession was allowed to the widow and the daughter-in-law; (6) that the arrangement, by which daughters are excluded, has not obtained a judicial recognition, (7) and that no such arrangement can be allowed to deprive property of its ordinary legal incidents, and, among others, the succession of the daughter after the widow; (8) that on grounds of expediency and natural equity, the daughter's claim to succeed to her father's estate ought to be upheld in preference to the separated kinsmen of the father; (9) and that no person can be allowed to set up arbitrary laws of inheritance for themselves repugnant to the general religious law to which they are admittedly subject.

"On these grounds and on the authority of the cases cited before, I hold, on the second point, that Sundrábái, notwithstanding that she is a female heir of a different *gotra*,

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has a right to succeed, under the general law of inheritance, to her separated father's property, and the alleged usage to contrary, though proved to have obtained in these Utpát families, cannot be upheld."

The appeal was argued before WESTROPP, C.J., and WEST, J.

*Ráv Sáheb V. N. Mandlik* for the appellant.

*Shántárám Náráyan* for the respondent.

The authorities cited and the arguments used by the pleaders on both sides fully appear from the following judgment of the High Court delivered by

WEST, J.:—This case, the previous proceedings in which are fully reported at 7 Bom., H. C. Rep. 153, A. C. J., was remanded for retrial upon the following issues, viz. :—

(1.) Whether, as regards the property in dispute, Purshotam Chimnáji (father of the defendant Sundrábái) was divided from the original plaintiffs.

(2.) Whether, according to the custom of the country, the defendant, Sundrábái, as a female, is excluded from inheriting the said property in dispute or any part thereof.

On the former of these issues, the Subordinate Judge, Mr. Ránade, has found that Purshotam was divided in interest from the plaintiffs. His judgment on this point has hardly been questioned. It rests on a very careful analysis of the evidence, and we see no reason for arriving at a different conclusion on this part of the case.

On the second issue, the Subordinate Judge has found that the evidence points "to a generally received family usage, by which, while female heirs of the same *gotra* are admitted to share, the daughters as belonging to a different *gotra* are excluded from succession." He concludes, therefore, that "the plaintiffs have made out their allegation of the existence of such usage in the Utpát families, by which, Sundrábái, as a daughter, would be excluded from succeeding to Purshotam's share." This finding, if relevant, should strictly have been decisive. Either evidence should not have

been taken of the family or class custom upon which the plaintiffs relied as having established a special rule of inheritance, by which they sought to benefit, because such a custom could not be the basis of a legal right, or else, being taken, because the custom would constitute a law, the decision should have been in accordance with its result. Probably, the Subordinate Judge wished to put on record the materials upon which a decision in appeal might be founded in the event of this Court's taking a different view from his own of the legal questions to which he proceeds to address himself, and he has certainly spared no pains to make his investigation thorough and effectual. The evidence given by the several witnesses has been minutely analysed in the arguments before us, but though it is not altogether one-sided, we are satisfied that, upon the whole, there is a great preponderance of testimony in favour of the view taken by the court below. The usage of the family or tribe of Utpáts has excluded daughters, who, by marriage, had entered another 'gotra,' from inheritance to their father's property. This usage is attested by a considerable number of witnesses, and is traced back so far as living memory goes without any apparent break in its uniform observance. The evidence shows also that a similar usage "obtains," as the Subordinate Judge says, "among the other priestly families in attendance upon the service of the shrine of Vithobá at Pandharpur and of the Devi Rukhmini and other temples," several of which families he specified.

Notwithstanding, however, the satisfactory proof of the existence of the usage in point of actual practice amongst the Utpáts and amongst other tribes similarly situated, the Subordinate Judge has found that the usage having, as he conjectures, originated in a "sort of pact between themselves" (the Utpát families) has no force as a law binding on any person who may choose to discard the custom. His arguments on this subject require a careful consideration. He puts the matter before himself thus, "how far such a family usage repugnant to the general religious law of the

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parties can be upheld, is the next question to which I shall now address myself." The question put by this Court was whether, according to the custom of the country, the defendant, Sundrábái, was excluded from inheritance, and there was a want of accuracy in identifying the custom of the country with the general religious law of the parties, unless that custom gave effect to the general religious law as a customary law. If it did give effect to it, then the question was, not whether a family usage repugnant to the general religious law could be upheld, but whether the usage was indeed repugnant to that religious law. The way in which the Subordinate Judge has stated the case begs the question on this, which is the most important point in the inquiry.

Manu, who, as Vrihaspati declares, "is pre-eminent and the touch-stone of all Smritis" (see Muir's S. Texts, vol. 3, p. 181), says (Ch. VIII., pl. 41)—"A king.....must inquire into the particular laws of classes, the laws of districts, the customs of traders, and the rules of certain families and establish their peculiar laws." To this Kulluka Bhat has added the gloss whence Sir W. Jones extracted the condition "if they be not repugnant to the law of God." Yájnavalkya (B. I. pl. 342) gives a similar injunction and the Vyavahára Mayukha (Ch. I., plac. 13) quotes from Brihaspati—"Let all rules of each country, caste, and family that have been observed from ancient times be still observed in the same way." The Subordinate Judge has remarked on this passage—"He makes no mention of family usage"—which is an obvious mistake, and the reason why family customs are allowed so important a place in the constitution of the Hindu law of inheritance is sufficiently evident when we bear in mind the intimate connexion between the celebration of the family sacrifices and the ownership of the family property which is found subsisting in the earliest times. By many of the sages indeed this connexion was made the basis of a theory of the spiritual origin of proprietary rights which Vijnáneshvar combats in the Mitákshará, but the mere possibility of which shows the closeness of the relation which

gave rise to it. The ancient law, looking on the family estate as furnishing a permanent means for the sustenance of the members and for the continuance of the traditional sacrifices, treated its wanton alienation as a kind of sacrilege; while in the hands of the family, to whose sacra it was in a manner dedicated, its devolution was regulated by the peculiar character of those sacra and of the religious notions connected with them. The sense of the rather obscure passage, Manu, Ch. VIII., pl. 42, appears to be that a wide severance in customs between subjects is yet consistent while they adhere conscientiously and uniformly to their own recognized usages with a community of mutual affection and national feeling, which, as plac. 41 says, imposes on the sovereign the necessity of recognizing and protecting each such usage. The gloss of Kulluka "provided they be not repugnant to the law of God" points to a subject largely discussed by the commentators, that of the relative weight and authority of the different component elements of the Hindu law. The Vedas, all agreed to regard as inspired and infallible; the Smritis were to be venerated according to the antiquity and the character of their supposed authors; the opinions of the learned were to receive high consideration where not repugnant to the Vedas or Smritis. But infallible as the Vedas were, and highly venerated as were the Smritis, contradictions appeared in their precepts which embarrassed the devout, and which, for practical purposes, it was absolutely necessary in some way to reconcile. Hence the precepts of Yájnavalkya and Bhrihaspati that, where texts differ, reason must prevail, and that a decision must not be grounded solely on the letter of the Codes (Col. Dig. B. II., Ch. IV., pl. 17, Bk. V., pl. 57, Com.; Vyav. May. Ch. 1, pl. 12). Even in Manu's time, it had become evident that different views might be taken of what the law prescribed. At Ch. XII., pl. 106, he says—"He and he only is acquainted with duty who investigates the injunctions of the Rishis and the precepts of the Smritis by reasonings which do not contradict the Veda," a condition on which Kulluka

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too insists in his commentary on the first Chapter of Manu's Institutes. Thus it became recognized as time ran on and new exigencies arose that "the reason of the law has more authority in judicial proceedings than the letter of express ordinances" (Col. Dig. B. II., Ch. IV., pl. 15, Com.) This reason, however, must always, in theory at least, be subordinate to the sacred writings, and ground itself directly or indirectly on those rules of the Vedas, which all Hindus regard as in an especial sense the laws of God.

Beside the different interpretations of the law which were embodied in the theories of scholars, and concurrently with their development, there grew up a great variety of customs and usages which, as they obtained amongst people who all professed their submission to the law of the Vedas, were recognized by the Hindu lawyers as embodying the interpretation placed by the class or family upon the precepts of their scriptures. In many instances, particular usages were referred to particular texts, which lent them at least a *primâ facie* support; and in the gradual adaptation of the legal system to the actual needs of society, the principle became recognized which Yájnavalkya (II. 21) expresses thus—"If two texts be opposed, *usage* is of force for their construction." And as, in the theoretical systems of the lawyers, a considerable latitude was allowed, so long as a general adherence to the doctrines of the Vedas was observed or professed, so in estimating the claims of a custom to recognition, a general congruity with the Vedic system was considered enough to make an ancient and uniform usage binding as law. In the Sutras of Gautama, it is said (Adhy. XI., Sutra 20) that "in the cases where the customs of countries, classes, and families are not expressly founded upon a passage of the Veda, they are notwithstanding to be observed if they are not clearly against the principles of the sacred writings, such as would be, for instance, marrying the daughter of a maternal uncle" (Max Müller, H. A. S. L. 53). This enables us to understand what Kulluka meant when he added to Manu's text giving the authority of law to class and

family customs the gloss "provided they be not repugnant to the law of God." The licence of custom follows the analogy of the licence of interpretation and theorizing. Jagannátha in Colebrooke's Digest (Bk. I., pl. 50, Com.) has some remarks on this subject which, though in their English dress rather uncouthly expressed, yet state the principle on which Hindu lawyers place the recognition of a custom as law with perfect correctness. Their substance is this—

"The use of the law is to prevent the introduction of "multifarious practices at the will of the present generation, "but where the texts or their constructions differ, usage "settles the rule; and a practice divergent in some measure "from particular ordinances, but not irreconcilable with the "ancient legislation, may receive recognition on the ground "of its mere congruity with the legal system. Where, there-"fore, such a practice cannot be got rid of, it may be re-"cognized, though one strictly conformable to the ordinary "law is to be preferred."

It appears to have been held in the case at 2 Calc. W. R. 80 C. R. that those interested in the maintenance of a special custom of descent may waive it and that then the ordinary law will prevail for the future. So also, the Privy Council in the case of *Sorrendronáth* v. *Heerámonee* say (*d*) that a family custom is capable of being destroyed by disuse where a legal origin and continuance had given it efficacy as to both ancestral and acquired possessions.

When Manu, therefore, says that the usages of localities, classes, and families are to be upheld, he does not probably mean to make the validity of custom depend on its strict conformity to recognized general law. This would at least be quite inconsistent with what, according to Sir W. Jones, he says in Bk. I., pl. 108, 110, that law itself "is grounded on immemorial custom" and that "immemorial custom is transcendant law." When Kulluka adds the proviso that the usage must "not be repugnant to the law of God," he means repugnant to the fundamental rules of the Vedas and

(*d*) 12 Moore I. A. 281, see p. 291; see also 9 Moore I. A. pp. 242 and 243.

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of Manu so as to be incapable of uniting with them in a harmonious system. This theory of customary law differs no doubt very widely in some respects from that which has been recently developed by the labours of European jurists, but if we adopt Savigny's notion of the customary law growing up by imperceptible modifications in the consciousness or predominant feelings of the community, that legal consciousness amongst the Hindus has accepted the law of the Vedas and the Smritis as a general rule of civil conduct, but accepted it with a recognition of the validity of class and family customs as an integral part of that law. If an established custom diverges from the ancient law, it yet stands, supposing it presents the requisite characteristics, on precisely the same footing in a temporal Court as the general law to which it forms an exception. Each rests on uniform immemorial usage *as* law. The Council of Shastris, whose replies are given at 2 Borr., 102, expressly ground their opinions as to a widow's power of adoption on local custom, which they admit to be opposed to the Shastras. This may be somewhat inconsistent with the approved way of regarding this subject, but it agrees with the principle involved in the Mitákshará, Ch. I., Sec. III., pl. 4, 7, and it shows that custom had here become an embodiment of the general conviction which superseded the ancient law, recognized in other respects by the same custom of the people. Conformably to this, the Privy Council say in *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (*c*) :—" The duty, therefore, of a European Judge, who is to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has then to deal and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law." There is no trace here of the doctrine glanced at by the Subordinate Judge that a custom cannot become

(*c*) 12 Moore I. A. 397, see p. 436.

legally obligatory until it has been made so by a judgment which, when it was passed, could not be law. Custom adopts the ancient law, modifies it, or rejects and supersedes it. Its authority in each case is the same, and if it receives into itself that part of the ancient law which gives force to family customs, those customs thus gain validity as part of the larger customary law in which they are embraced.

The Subordinate Judge admits, after considering the subject at some length, that a Hindu tribunal "would have made no distinction between the usages of families and caste or local customs." "But from the authorities," he continues, "it is plain that such a distinction has been made all along in British Courts of Justice and in Civil Courts governed by the Regulations." This distinction was strongly pressed on the Court by Mr. Shántárám also on behalf of the respondent; but if, as the Subordinate Judge says, it does not rest on anything in the Hindu law itself, it would require a uniform course of decisions expressly on the point to establish it as a principle to be recognized as grafted for ever upon that law. Of those cited by the Subordinate Judge, *Rawat Urjun Sing* v. *Rawat Ghunsiam Sing* (*f*) does not in any way support his argument. The Honourable Pemberton Leigh, in delivering judgment, says: "The only question in the case is one of the family custom and usage," which it was adjudged had established a law of primogeniture for the parties before the Court. The case of *Baboo Gunesh Dutt* v. *Maharaja Moheshur Singh* (*g*) is to precisely the same effect so far as it bears on the present inquiry. The property in dispute was one of the class regarded as a *ráj*, and the judgment says (p. 187) "there is no doubt that the general law, with respect to inheritance as well as with respect to other matters, may, in the case of great families where it has been shown that usage has prevailed for a very long series of years, be controlled unless there be positive law to the contrary." From these cases, it is clear that family usage

(*f*) 5 Moore I. A. 169. (*g*) 6 Moore I. A. 164.

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may control the ordinary law in the case of families having large possessions; it is not said that such usage is to be of non-effect in other cases, and the Hindu law makes no distinction between large estates and small. Whether the customary law of the district did so or not was a part of the question that the Subordinate Judge had to try.

Of the cases decided by this Court, the earliest cited is that at 1 Bom. H. C. Rep. App. 42. The head-note of this case supports the judgment of the court below, but it is to be observed that the family custom averred by the defendant was held not proved. "The witnesses," it is said (at p. 45), "are not able to show that even this practice (of non-partition) has been general or of any long continuance." Further on (p. 47) the judgment refers to those in the Privy Council already discussed, and says that probably the "same law would unhesitatingly be applied to some classes of Thakurs and Chiefs in this Presidency, among whom, by settled custom, the principality descends indivisible to the eldest son." That is, a recognized custom constitutes the law of the class. "But it would be a dangerous doctrine," Newton, J., proceeds, "that any petty family is at liberty to make a law for itself, and thus to set aside the general law of the country," and then it is adjudged that "no custom having the force of law..... has been made out to except the property in dispute from the general rules of inheritance of the Hindu law." The effect of this, bearing in mind the facts that had to be dealt with, is that a custom of a petty family, not shown to have been uniformly observed or of long continuance, will not constitute a law for that family. But precisely the same thing may be said of any family whatever. It was said in *Myna Boyee's case* (*h*): "The parties could not, by their agreement, give new rights of succession to themselves or their heirs unknown to the law," and in the more recent case of *Umrithnáth Chowdhry* v. *Gourcenáth Chowdhry* (*i*), Lord Justice James says, that a family custom of inheritance "is a thing that cannot be predicated of a simple and single

(*h*) 8 Moore I. A. 400. (*i*) 13 Moore I. A. 542. See p. 549.

estate, the title to which dates from comparatively a short period of time back." The attributes of antiquity and uniformity of usage in a plurality of instances must needs be wanting in such cases. It is very hard to show that the usage has been submitted to in a single family from a sense of legal necessity rather than by way of conventional arrangement. The custom must, in theory at least, be of an origin as ancient as the law itself to which it constitutes an exception. The courts will, from uniform modern usage, presume an indefinitely ancient usage of the like kind, in the absence of circumstances leading to a contrary inference, as in the cases of *Shepherd* v. *Payne* (*j*) and *Lord Waterpark* v. *Fennell* (*k*); and this agrees in effect with what Savigny (System, Sections 28, 29) says on the same subject, but no such presumption can be made where the practice is traced to a recent agreement. The power of a family to make a new law for itself is nowhere recognized, but an ancient custom is held to have always been the law or to have had a legal origin, when this is possible.

The remaining case relied on by the Subordinate Judge was that of *Mádhavráv* v. *Bálkrishná* (*l*). This case rests on that of *Tara Chand* v. *Reeb Ram* (*m*), following which, the Judges say: "We consider that no evidence of the acts of a single family repugnant or antagonistic to the general law will establish a valid custom or usage which can be enforced by a Court of Justice." Now, if this dictum is to be taken in its broadest sense, there can be no such thing as family custom as a source of law—what the Subordinate Judge says of its standing on the same level as local and caste custom in the Hindu system is made of non-effect. But looking to the report of the Madras case, we find that the family was descended from the illegitimate children of a European by a Hindu woman. It was of recent origin. The acts of such a family could not make a customary law for it according to the tests laid down by the Privy Council. It was not pretended, so

(*j*) 31 L. J. 297 C. P.; S. C. 12 C. B. N. S. 414.
(*k*) 5 Jur. N.S. 1135; S. C. 7 Ho. of Lds. 650. (*l*) 4 Bom. H. C.R. 113 A.C.J.
(*m*) 3 Mad. H. C. R. 50.

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far as appears, that the special family rule relied on was at all reconcilable in principle with Manu or the Vedas. It could make no difference in such a case whether the alleged customary law "was antagonistic to the general law": it was not and could not be a customary law at all. The Bombay case applies the principle to what may have been very different circumstances, but here, as there, it may have been the case, or may have seemed to the learned Judges, that the alleged family custom was of recent origin. If the only objection to the alleged custom of primogeniture was its repugnancy to the general law, the case would, in our opinion, fall under the principles we have already discussed. Those principles have been upheld in a long series of decisions by Her Majesty's Privy Council, and do not any longer admit of serious controversy. In a good many cases, the question of family custom has been mixed up with that of the supposed impartible character of a *ráj* or principality, and this has perhaps led to some little confusion in particular instances, but a careful examination of the cases will show that the special law of descent has usually been put by the Privy Council, as in the case of *Neelkisto Deb* v. *Beerchunder Thakoor* (*n*), on the ground of ancient family custom whether the property was a *ráj* or not. There are other cases, like that of *Ghirdharee Sing* v. *Koolahul Sing* (*o*), in which the fact that the estate was a *ráj* was held not to involve the consequence that it was indivisible under a special law of inheritance applicable to that species of property; and generally it may be said that it is the family custom of descent, which, for juridical purposes, gives the property the character of a *ráj*, and not anything in the estate itself, which determines the rights of pretenders to it. In a case at 7 Bengal S. D. A. Rep. 195, it was ruled that on a property which had descended in one family, according to a rule of primogeniture, undivided, passing to another family in which no special rule prevailed, it became partible according to the ordinary law. Thus viewed, all the numerous cases of pro-

(*n*) 12 Moore I. A. 523. (*o*) 2 Moore I. A. 344.

perty, regarded as impartible because "partaking of the nature of a ráj," are instances of the effect which the highest court has given to family customs diverging from and, therefore, in a sense "repugnant or antagonistic to the general law." "The prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent, in that place, of the property of people of that class or race, stands on the footing of usage or custom of the family" (Privy Council at 12 M. I. A. 91), and this is sufficient to cover all the cases.

It seems highly probable that in the earliest form of the Hindu law, women were generally excluded from inheritance. Such texts, as Manu, IX., 185, 187, point strongly in this direction, and a general incapacity qualified by special privileges is the leading doctrine of Bandhayana and his followers (1 W. & B. 318). Apastambha does not mention even widows amongst a man's heirs (Apast. II., 6, 14); and though he mentions a daughter as capable of inheriting in default of other heirs, he assigns to her the last place in the line so as to save an escheat to the crown (*ibid*). But as a wife, who had assisted in kindling the sacred domestic fire, became inseparably connected with the corresponding sacrificial rites (Apast. II., 5, 11), a way was thus opened for her acquisition of the right of inheritance on failure of the sons who should have continued the family sacra. This stage of progress was not reached without vehement contests, as may be seen from the elaborate discussions and artificial reasonings in the Mitákshará, Ch. 2, S. 1, and the Vyav. Mayukha, Ch. 4, S. 8, although the passage of Manu quoted by Vijnáneshwara (Ch. 2, S. 1, pl. 6) should seem to leave but little room for doubt as to the widow's right, if it were not for passages of an opposite tendency, some of which are immediately afterwards cited (*ibid*, pl. 7). There can be no reasonable doubt that the appointment of a widow to raise up off-spring to her husband, was once a living institution amongst the Hindus, although, by Manu's time, it had already become disreputable in the higher castes; and, by

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many of the ancient writers, her right of succession was connected with her appointment or her intention to provide a son for her deceased husband, so that the celebration of the all-essential sacra might never fail.

It was through the influence of the same set of ideas that the right of the daughter became generally established. Manu (Ch. IX., 105) preserves evidence of a once prevailing rule of primogeniture shared by the Hindus with the other Aryan nations. This was succeeded by the law of equal partition amongst the sons (Mit., Ch. I., S. 3), probably through the interest felt by the priestly depositaries of the law in an increase of sacrifices. The daughter, at first excluded by her sex, came in as a possible mother of a son capable through an artificial extension of the primeval rule of continuing the family sacrifices. Then she became capable of appointment herself (Mit., Ch. I., XI., pl. 3, and notes), and as the whole doctrine of appointment grew abhorrent to the people as they advanced in cultivation, she was admitted by the Benares school in her own right (Mit., Ch. II., S. II.); while the Bengal school still excludes her except as a mother or possible mother of male issue. But a remnant of the older state of things is preserved in the Mitákshará rule also "Let the daughter inherit *if unmarried*." Even down to the time of Vijnáneshwar, no ground could be found on which to base the independent right of a *married* daughter except a forced analogy drawn from the succession to a woman's peculiar property (*ib.*, pl. 4). The passing of the property to the support of foreign sacra in another *gotra* was abhorrent to the early theory of the law; the unmarried daughter might be disposed of so as to perpetuate the sacra of her own ancestors. Such a set of ideas, strange as it seems to us, lay at the very foundation of the ancient societies. Amongst the Jews, besides the law of appointment to raise up issue, there was a rule that a daughter becoming sole heiress must marry within her own tril . The Solonian legislation, itself a mitigation of the sterner and more logical laws of an earlier time, still excluded a daughter from suc-

cession, providing in her favour, when she was an only child, that the agnate, who took the property, should also take her to wife. Even our own law is not free from what may some day be deemed an unnatural preference of males to females as successors to property.

In the first Section of Ch. II. of the Mitákshará already referred to, there is an elaborate refutation (pl. 15 ss) of the doctrine that "Riches being ordained for sacrifices should be allotted to those who perform religious duties" to the exclusion of women. Vijnáneshwara admits the authority of the texts, but he says (pl. 24) that if the word sacrifices be extended to include religious acts in general, then, to the performance of some of these, women are competent, and then he states and answers the question "How then are the passages (establishing the connexion between sacrifices and succession) to be understood?" "Wealth," he says, "which was obtained for the express purpose of furnishing the means for sacrifices, must be appropriated exclusively to that use even by sons and other successors." The possessions of priestly families handed down from the past in perpetual connexion with the duty or the right of officiating in particular temples and more especially the proceeds of the offerings of the worshippers would naturally come to be looked on as originally devoted to this express purpose. A prescriptive right would attach itself to the line of persons capable of celebrating the prescribed ceremonies. Although, therefore, wealth in general be constituted, as Vijnáneshwara insists, by popular recognition without special reference to its function of sustaining sacrifices, yet it is consistent with principles which he accepts that the estate of such families as those of the Utpáts should be kept together by rules of succession of a special kind providing against their severance from the proper functions of the tribe. Amongst a sacerdotal class, the importance of the rites they celebrated would naturally be highly esteemed, and would lead to an adoption of those rules, by which temporal benefits should attend religious superiority, rather than a mere connexion by blood

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with a previous holder of property when that connexion had been superseded by a new birth in another tribe.

It might be expected, seeing how the doctrine of the daughter's capacity to inherit has been introduced, that there would be considerable diversities in admitting or denying it by the customs of different castes and classes, even amongst those generally professing submission to the same *shastras*. In Borradaile's caste rules, while the place assigned to the daughter by the Mitákshará is generally recognized, instances will be found in several places in which she is postponed to divided brothers and their sons, or even to remoter *sapindas* of her father. Examples will be found at pages 163, 180, 234, 298, 397, 500, 588, 684, and 783, of the volume in the Court's Library. In one or two of these, a distinction is drawn between fixed and moveable property. At p. 638 is a case of custom excluding a daughter from succession to ancestral property while admitting her right to that which was acquired by her father. In the statement of caste customs at p. 397 ss, the particular customs of five or six families as to inheritance are set forth as varying from the ordinary law of the caste. In two Gour families, it is said (p. 400), "the right of inheritance solely to the Jajman Vritti pertains after the widow's death to the paternal relatives" to the exclusion of the daughter. Here we have an instance of the connexion of property with a sacred office giving rise to a special law of inheritance in the families enjoying it similar to that in the Achárya case at p. 56 of the Madras Sadar Reports for 1862.

It cannot, we think, be said, regard being had to the considerations on which we have dwelt, that the special rule of inheritance, proved to exist in this case, is so repugnant to the fundamental principles of the Hindu law that recognition should be refused to it according to the test that would be applied by Hindu lawyers. The examples, to which we have referred, show that it is not opposed to any universal popular conviction. It is ancient and uniform in the reasonable acceptation of those terms, and so far as the evidence

shows, it may well have had a legal origin and is certainly not traced back to any mere mistake, the correction of which would change the legal conviction based on it. It is not unreasonable, according to the ideas of the Hindu community, which, as we have seen, are liberal in recognizing family laws, nor is it opposed to any public interest, which should lead the courts to refuse it recognition. There is a certain amount of administrative inconvenience arising from diversities of law in a community, and this is greater when the variation belongs to a family rather than a locality; but that inconvenience is not a good reason for refusing recognition to a branch of the Hindu law clearly embraced within the customary law of the country. The greatest care, as has been said in an earlier stage of this case, must be exercised in accepting an alleged custom as proved. When it is a family custom, the testimony must show clearly that it has been submitted to as legally binding, not as a mere arrangement by mutual assent for peace or convenience. But when, as in the present case, the usage is proved and found to extend also to a considerable class of families holding temple offices similar to those held by the Utpáts, we cannot refuse to recognize that usage. By it, as the Subordinate Judge has found, Sundrábái, as a daughter, "is excluded from succeeding to Purshotam's share," which must, by preference, go to the brothers of Purshotam and their representative, the appellant Bháu Nánáji. We, therefore, reverse the Subordinate Judge's decree, and award the property claimed to the appellant.

The parties severally to bear their own costs.

*Decree reversed.*

[APPELLATE CRIMINAL JURISDICTION.]

1874. December 2.

## REG. *v.* GOVIND BA'BLI RA'UL and BA'BA'JI GOVIND KUBAL.

*Confession—Prisoners jointly tried—Indian Evidence Act, Section* 30—*Amendment of Charge—Criminal Procedure Code, Sections* 447 *to* 449.

While *A* and *B* were being jointly tried before a Court of Session, the first for murder and the second for abetment of murder, a confession made by *A* that he himself had committed the murder at the instigation of *B*, was put in as evidence against *A*. Subsequently the charge against *A* was altered to one of abetment of murder, and the Session Judge, under the authority of Section 30 of the Indian Evidence Act, used the confession against both, and convicted them.

The High Court held that the original and amended charges were so nearly related that the trial might, without any unfairness, be deemed to have been a trial on the amended charge from the commencement; and that no objection having been taken by *B*, who was represented by a Vakil, to the admissibility of *A's* confession against him when the charge against *A* was altered, the Session Judge was justified in using the confession against *B* also.

THE accused Govind and Bábáji were convicted by R. W. Hunter, Session Judge of Ratnágiri, of the abetment of murder, and the former was sentenced to transportation for life, and the latter to death.

The material facts of the case are briefly as follows :—

Prisoner Govind confessed to a Magistrate that he, at the instigation of prisioner Bábáji, by laying poison before an idol, caused it to be taken by members of the complainant Rám Kubal's family, thus causing the death of two of his children. Govind was committed on a charge of murder, and Bábáji on that of abetment of murder, and a joint trial upon these charges was commenced in the Court of Session. In this state of affairs, the confession of Govind was tendered in evidence, and was received as against Govind. Subsequently the Judge saw fit to alter the charge against him to one of abetment of murder, so as to make the charge against both the prisoners identical, and he then took into consider-

ation, under Section 30 of the Indian Evidence Act, Govind's confession against Bábáji, and relying upon it, coupled with the other evidence in the case, convicted both the prisoners of abetment of murder.

The appeal was heard by WEST and NA'NA'BHA'I HARIDA S, JJ.

*Branson* (with him *Shivshanker Govindrám* and *Manikshá Jehángirshá*) for the appellants :—When the confession of Govind was received, he and Bábáji were charged with different offences, and his confession should not, therefore, have been considered against Bábáji : *Reg* v. *Jaffir Ali* (*a*). Even though no objection was raised by Bábáji or his pleader, the Judge was bound, under Section 256 of the Code of Criminal Procedure, to have thrown it out of his consideration.

*Dhirajlál Mathuradás*, Government Pleader, for the Crown.

WEST, J. :—As to the point of the admissibility of prisoner Govind's confession as evidence against the second prisoner, Bábáji, we think that the Session Judge was justified in admitting that confession, not only against Govind, but against his fellow-prisoner. No doubt, when it was received, the two accused were before the court on different charges, and it was received under the notion that it was evidence against Govind alone. But the Code of Criminal Procedure, by Section 447 and the following sections, provides for an amendment of the charge at any stage of the trial, and enables the Court, at its discretion, after making such amendment, to proceed with the trial as if the amended charge had been the original charge. The amendment of the charge in this case made the charge identical against both the accused. If both had been charged originally with abetment, the confession of one would have been received without question against the other. Some difficulty might indeed conceivably arise out of dealing with a case of a confession of prisoner *B* as evidence against prisoner *A* (then under trial jointly on a different charge), who, at the time when this confession was recorded, might

(*a*) 19 Cal. W. R. Cr. R. 57.

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possibly have raised an objection against its legal admissibility, or might have started questions which would have served his purpose, but for their apparent irrelevancy at that time. But looking to the principle laid down in Sections 447 to 449, it is clear that the intention of the Legislature is, that whenever an amendment of the charge in any way tends to prejudice the prisoner, steps should be taken to prevent that consequence arising by ordering a new trial, or suspending the trial going on, to enable him to make his defence, or to examine any material witness, or to recall any witnesses already examined. The same principle extends to all instances of material prejudice arising to any one under trial from an amendment made in the course of the proceedings. If we found that the Session Court had overlooked this principle, that the prisoner Bábáji had objected, on valid grounds, to the reception of the confession, or that this prisoner had really been prejudiced by the refusal of an adjournment, or in any other manner, we should, in a confirmation case, give the accused the full benefit of the objection. We find, however, that the prisoner Bábáji in whose favour the objection is raised here, was defended by a competent pleader, who, when the charge against Govind was amended, neither asked for a new trial, nor sought to raise any objection to the admissibility of the confession as evidence against his client. It is only in the case of charges closely related that a trial goes on forthwith after an amendment; and in this instance the original and amended charges are so nearly related, that in the absence of technical objections urged on behalf of the prisoner Bábáji, the trial might, without any unfairness, be deemed, for the reception of evidence and all other purposes, to have been a trial on the amended charge from its commencement. It was only when he came to draw up his judgment that the Judge took Govind's confession into consideration against Bábáji, and at that moment they were both jointly under trial for the same offence. Therefore, the objection must be disallowed, although, at first sight, it might seem to possess some force.

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[His Lordship then went on to the consideration of the evidence against both prisoners, and Bábáji was acquitted and discharged, while the conviction and sentence against Govind were confirmed.]

*Order accordingly.*

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[APPELLATE CRIMINAL JURISDICTION.]

REG. *v.* ARJUN MEGHA' AND MA'NA' JEESA'.

August 26.

*The Code of Criminal Procedure, Section 249—Appeal against exercise of discretion.*

The purpose of Section 249 of the Code of Criminal Procedure, as amended by Section 20 of Act XI. of 1874, is to make depositions given before Magistrates in the preliminary inquiry evidence in the trial before the Court of Session, only when the Session Judge determines, in the exercise of his discretion, that they are to be used in this way. But the exercise of this discretion, considering it as a matter of fact or law, is open to review by the Appellate Court.

THE appellants, with two other accused, were tried and convicted of murder by W. H. Newnham, Session Judge of Ahmedabad, and sentenced to death.

The appeal by two of the prisoners and the reference for confirmation of the sentences of death were heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

*Shántárám Náráyan* for the appellants:—There are discrepancies in the depositions made by some of the witnesses for the prosecution before the committing Magistrate and the Session Judge. Section 249 of the Code, as modified by the amending Act of 1874, implies that the Session Judge must, in proper cases, exercise a discretion, and make the depositions given in the preliminary inquiry evidence in the trial. Where he fails to do this, we have a right to appeal to this Court to review his proceeding, and ask it to exercise the discretion itself, or order the Session Court to do so in a proper manner. It should appear on the Session Judge's proceedings how he exercises any discretion which the law vests in him.

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*Dhirajlál Matuhrádás*, Government Pleader, for the Crown :—The Session Judge is not bound to give reasons for omitting to make previous depositions evidence in the trial before him, though he should give reasons when he does admit those depositions on the trial.

WEST, J., in giving judgment, said :—We think that the purpose of Section 249 of the Criminal Procedure Code, as recently amended, is to make depositions given before magistrates in the preliminary inquiry, evidence for the purposes of the trial in the Court of Sessions, only when the Session Judge determines, in the exercise of his discretion, that they are to be used in this way. But we think that the exercise of this discretion, considering it as a matter of fact or of law, is open to review by this Court in appeal. When a case is under trial in a Court of Session, the Session Judge has the depositions given in the Magistrate's Court before him. If he finds that the statements of the witnesses in his own court differ materially from those previously made by the same witnesses, it is his duty to examine them as to the discrepancies, and this is more especially his duty when the prisoners are undefended, and contradictory testimony is given for the prosecution. But if he thus examines the witnesses, he ought (see Taylor on Evidence, Sections 1300, 1301, and Indian Evidence Act, Section 155,) in ordinary cases to make the depositions upon which he has examined them evidence in the case ; he is at liberty to do so, and the power should be exercised so as to bring all relevant matter, so far as possible, under consideration in forming a judgment on the case. If the Session Judge has omitted to examine witnesses on obvious and important discrepancies in their statements, this Court will in general direct that such an examination be made, and the Session Judge having the witnesses before him for such a purpose, will, in most cases, feel it his duty to make the former depositions evidence *quantum valeant* for the purposes of the final adjudication in appeal. The alternative is for this Court in such cases to order a new trial, on the ground that there has been a misuse of the Session

Judge's discretion, which may have caused a defeat of justice; but a new trial will not be ordered except in special cases. 1874.

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[After going into the merits, the Court confirmed the convictions, and directed the prisoners to be transported for life.]

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[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No.* 85 *of* 1874.

October 5.

LILA' MORJI, deceased, by his son and heir RAVI ... } *Defendant and Appellant.*

VA'SUDEV MORESHVAR GANPULE ..... } *Plaintiff and Respondent.*

*Hindu law—Joint family property—Mortgage—Onus probandi—Redemption—Cause of action.*

Where joint family property is morgaged by one parcener, in order that it may bind the other co-parceners, the mortgagee must prove *affirmatively* that the mortgage was assented to by the other co-parceners, or was necessary for family purposes.

A mortgage deed, which was executed in March 1858, provided for the redemption of the mortgaged property after the expiration of fifteen years from date. In a suit brought in 1867 to recover part of this property, the Appellate Court held the plaintiff entitled to recover, because on the 29th November 1873, when that court passed its decision, the time fixed for redemption in the mortgage deed had already expired:

*Held* in special appeal in reversal of the decree of the lower court that in 1867, when the suit was brought, the right even to redeem the mortgaged property even as a whole had not accrued, and that, therefore, the action was premature.

THIS was a special appeal from the decision of E. Cordeaux, Assistant Judge at Ratnágiri, affirming the decree of the Subordinate Judge of Chiplun.

The case had originally come before the High Court in special appeal No. 185 of 1872, against the decision of H. J. Parsons, Assistant Judge at the same place.

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The facts, so far as they are material to the present report, are these :—

The plaintiff, Vásudev, brought this suit (No. 442 of 1867) to obtain partition of a fourth part of an eight-anna share in a certain field, and claimed possession thereof as purchaser from three persons, namely, Bábáji, Abá, and Bálu, who were members of a joint family. The defendant Lilá pleaded that he had been in possession of the whole field since 1840 under four mortgage deeds, of which the more recent were exhibits Nos. 97 and 26, dated respectively the 19th March 1858 and 17th November 1862. Both these mortgages were executed by Hábáji and Tátia, who were undivided members of the family of the plaintiff's vendors. The mortgagee, Lilá, was to remain in possession of the field for fifteen years under the mortgage deed No. 97, and for twenty-two years under No. 26. The first court held both the mortgages proved, and decreed plaintiff not entitled to redeem till A.D. 1884, according to the terms of the last mortgage No. 26. In appeal, the plaintiff (Vásudev) contended that the mortgages in question did not bind him, as they were not executed by his vendors, and not shown to have been passed for any common family benefit. The Assistant Judge held the mortgages to be binding on the plaintiff, because he considered that most of the family had joined in the original mortgage; that the other mortgages had been mere enlargements of the former one; that no objection to any one of them had ever been made by any of the persons through whom the plaintiff claimed; and lastly, that there was "no evidence at all on the side of the plaintiff that the mortgages were not entered into with the consent of the whole family, or that the purposes for them were not necessary."

The case coming on in special appeal before SARGENT, Acting C.J., and MELVILL, J., on the 5th September 1872.

*Vishnu Ghanashám*, for the plaintiff (who was then appellant), contended that the lower court had wrongly placed on Vásudev the burden of proving *negatively* that the land in

dispute had not been mortgaged to the defendant, Lilá, with the consent of the whole family, or that the money borrowed was not necessary for family purposes, whereas the defendant, as mortgagee, was bound to show *affirmatively* that the mortgage debt had been contracted by a managing member of the family, either for necessary purposes or with the assent of the whole family, as held in *Gane* v. *Káne* (*a*).

*Ghanashám Nilkanthá Nádkarni* (for *Shántárám Náráyan*), for the respondent, argued that the Assistant Judge had distinctly found that most of the family had joined in the first mortgage, and that the others were renewals of the first one, and that, therefore, the mortgages bound the plaintiff, as they bound his vendors.

The High Court remanded the case for a fresh trial under the following order :—

"The mortgage No. 26 was to secure Rs. 475, then due on the mortgage No. 97, and a further advance of Rs. 525, making in all Rs. 1,000. Neither of the mortgages Nos. 26 and 97 was executed by any one of the persons through whom the plaintiff claims. The Assistant Judge says: "There is no evidence at all on the side of the plaintiff that the mortgages were not entered into with the consent of the whole family, or that the purposes for them were not necessary" But in thus laying the *onus* upon the plaintiff instead of the defendant, the Assistant Judge was clearly wrong. The decree must, therefore, be reversed, and the case remanded for the Assistant Judge to pass a new decree, having regard to the above remarks.

On remand, the Subordinate-Judge of Chiplun decreed the plaintiff's claim in his favour, on the ground of the defendant's failure to prove that the land had been mortgaged with the consent of the whole family, or that the mortgages were necessary. In appeal, however, Mr. Cordeaux (who, in the mean time, had succeeded Mr. Parsons,) held the mortgages to have been executed by the managing members of the family and for necessary purposes. He decided, however, that No. 26 was null and void as against the plaintiff, under Section 240

(*a*) 4 Bom. H. C. Rep. 169, A. C. J.

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of the Civil Procedure Code, because the land was under attachment at the instance of one of the plaintiff's vendors, when that deed was passed. He, nevertheless, held the plaintiff entitled to recover a fourth part of the land as claimed by him, because the term of the mortgage No. 97 (dated 19th March 1858) had already expired in March 1873, the Assistant Judge giving his judgment on the 29th November 1873.

In special appeal, it was contended, among other things, that if the time of the mortgage No. 97 expired in March 1873, the plaintiff had no cause of action in 1867, when the present suit was instituted.

The special appeal was argued before WEST and NA'NA'-BHA'I HARIDA'S, J.J., on the 5th October 1874.

*Shivshankar Govindrám* for the appellant.

*Vishnu Granashám* for the respondent.

WEST, J.:—The Assistant Judge has found that the document No. 97 was passed by the managing members of the family for a common family necessity. Rejecting the more recent deed, No. 26, as executed, while the property was under an attachment, to the benefit of which the plaintiff is entitled, he considered that the document No. 97 had entitled the defendant, Ravi Lilá, to retain possession for 15 years or till 1873, and as this time had elapsed at the time of his own judgment, he awarded possession to the plaintiff. But putting aside the questions of the plaintiff's right to recover possession at all without payment of land properly mortgaged, and of his right to redeem a fraction of what was mortgaged as a whole, it is clear that in 1867, when the suit in this case was instituted, the right even to redeem the whole had not accrued. The plaintiff, representing the coparcener, Bábáji, was bound by what bound Bábáji, by the mortgage therefore; and could not claim possession of Bábáji's share on any terms until 1873.

We must, therefore, reverse the decrees of the lower courts, and reject Vásudev's claim with costs throughout.

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Where a Subordinate Judge, in consequence of a fresh suit by the plaintiff, stayed the execution of a decree which was passed in the defendant's favour for costs, the High Court, in exercise of its extraordinary jurisdiction, reversed the stay order. *Gambhirmal and Bánáchand* v. *Chejmal Jodhmal and other*.....151

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The Limitation Act IX. of 1871 comes into operation from 1st July 1871 with respect to appeals and applications, and is not controlled by the General Clauses Act I. of 1868, Section 6.

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The application of the 27th September 1871 cannot be regarded as a mere continuation of a proceeding pending, viz., of the last preceding application of the 7th January 1868, within the meaning of Act I. of 1868, Section 6, at the time when the new Limitation Act came into operation, though the order on the latter application having been made on the 31st March 1870, would possibly have been a sufficient proceeding within the 20th section of Act XIV. of 1859 to constitute a fresh terminus, whence time might run under that Act. *Govind* v. *Náráyan* ..... ..... 111

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The statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, where the latter states he was and saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point. Sections 5, 11, and 153 (Illustration C) of Act I. of 1872.

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PER WEST, J.:—Where a person charges another with having forged a promissory note, and denies having ever executed any promissory note at all, the evidence that a note, similar to the one alleged to be forged, was, in fact, executed by that person, is not admissible, nor even would a judgment, founded upon such note, be so: Sections 43 and 153 of the Indian Evidence Act. *Reg.* v. *Parbudás* .....90

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the confession into consideration against those prisoners who pleaded not guilty. The proper course for the Judge was either to have sentenced the prisoner who pleaded guilty, and then put him aside, or to have waited to see what the evidence would disclose.

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SEC. 91—

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*Held* that the defendant was estopped from disputing the validity of the adoption.

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The purchaser, mortgagee, or other alienee, for valuable consideration of such an unascertained share, cannot, before partition, insist upon the possession of any particular portion of the undivided family estate.

The mortgagee or purchaser of a share in the undivided ancestral estate of a Hindu family takes such share subject to the prior charges or incumbrances affecting the family estate or that particular share. *Udarám Sitárám* v. *Ránu Pánduji and Venku Pánduji* ...76

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The High Court held that the original and amended charges were so nearly related that the trial might, without any unfairness, be deemed to have been a trial on the amended charge from the commencement; and that no objection having been taken by *B*, who was represented by a Vakil, to the admissibility of *A's* confession against him when the charge against *A* was altered, the Session Judge was justified in using the confession agajnst *B* also. *Reg. v. Govind Bábli* ..... 278

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On regular appeal to the High Court:

*Held* that the term "applicant" in Section 256 is not confined to the parties to the suit, but also includes any person who has sustained substantial injury by reason of any material irregularity in publishing or conducting the sale.

*Held also* that, although the applicant was creditor for a sum less than Rs. 5,000, still, as the sale took place in a suit for a sum above Rs. 5,000, an appeal lay to the High Court.

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ASSESSMENT—

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*Held* that the cause of action first arose, and the right was actually interfered with, by the Collector compelling payment of the rent; and that as the suit was brought within 12 years from that date, it was not barred ; but that only one year's arrears was recoverable under Act XIV. of 1859, Section 1, Cl. 4. *Bhujang* v. *Collector of Belgaum* ..... ..... 1

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But if the application of the judgment-creditor were for a general attachment under Section 218 of the Code, and the Court took no such security from him as it might take under that section, and if the Court granted a general warrant for the attachment of the moveable property of the judgment-debtor, and the officer of the Court, without any suggestion to that effect from the judgment-creditor or his agent, beyond a general direction to execute the warrant, were to seize property not belonging to the judgment-debtor, the judgment-creditor would not be responsible.

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The fact that a puisne attaching-creditor mentioned, in his application for attachment and sale of certain property of his judgment-debtor, that the same property had already been attached at the instance of another execution-creditor, does not render the puisne creditor a claimant through the first attaching creditor.

A puisne attaching creditor cannot be regarded as claiming through a prior attaching creditor, though the assignee of an attaching creditor's rights, or the next of kin of a deceased attaching creditor, may be said to claim under or through him.

Act VIII. of 1859, Section 240, is for the benefit of an attaching-creditor (subsequent to, and in defiance of, whose attachment, the private alienation, thereby declared void, has been made), and of those claiming under or through him, and not for the benefit of puisne attaching-creditors, whose attachment is laid later than such private alienation.

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*Held* that even if *A* had no authority from *B* to sign his name, and if *A* wished to deceive the Mámlatdár into the belief that it was *B* himself who had signed the petitions, still, if there had been no intention to defraud anybody, or if no wrongful gain or wrongful loss could have been caused to *A* or *B*, *A's* act did not constitute forgery within the meaning of the Indian Penal Code.

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A certificate of administration ought not to be forced upon the mother of a minor unwilling to take it.

Where an order for the issue of such a certificate to the mother of an infant was made, on the default of the mother to appear and show cause why it should not be issued to her:

*Held* that such default in appearance ought not to have been accepted as her assent to the issuing of the certificate to her.

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The High Court, however, in the exercise of its extraordinary jurisdiction, will examine the judicial propriety of such an order.

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Act VIII. of 1859, Section 240, is for the benefit of an attaching creditor (subsequent to, and in defiance of, whose attachment, the private alienation, thereby declared void, has been made), and of those claiming under or through him, and not for the benefit of puisne attaching creditors, whose attachment is laid later than such private alienation. *Bálájí* v. *Gajánan* .....159

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SEC. 256.—*See* PROCEDURE, 2 ...193
SEC. 257 .....17, 18
SEC. 269—

The words "suit to establish his right" in Section 269 of the Civil Procedure Code mean a suit to establish his right to *present* possession; but where there is a subsisting right which is contradicted by the summary order under that section, and which is to be properly asserted by such a suit, the suit, by the person dispossessed or refused possession, to establish his right, must be brought within one year from the date of the order, failing which he cannot sue afterwards on any portion of such right. It is otherwise, where his right is consistent with the order, and the possession given under it. *Rango Vithal* v. *Rikivdás* .....174

SECS. 270 AND 271—

Sections 270 and 271 of the Civil Procedure Code apply only to cases where there has been a sale under the first attachment. *Bálájí* v. *Gajanan* .....159

SEC. 271 .....18
SEC. 283 .....152, 154
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SEC. 338 .....215
SEC. 350 .....131, 134, 215
SEC. 360 .....215
SEC. 364.—*See* SEC. 209.

COIN.—*See* INDIAN PENAL CODE, SECS. 230 AND 231.

COLLECTOR—

The Collector may be responsible to the mortgagee of a revenue defaulter for refusing to accept the tender made by him of the Government rent, but if he does refuse it, and the land is sold, the title of the purchaser is unimpeachable. *Ghelábhái Bhikáridás* v. *Prámjivan Ichhárám* .....218

*See* ASSESSMENT.

COLLUSION—*See* JURISDICTION, 3.

CONDITIONAL ADOPTION—

Where a Hindu widow, in whom had vested by inheritance the whole of her husband's property, moveable and immoveable, agreed to accept a boy in adoption on an express agreement by his father that during her lifetime she should be entitled to such property, subject, however, to the boy's maintenance and education, and, upon the faith of such agreement, adopted the boy, it appearing that she would not have done so at all if it had not been for such agreement:

*Held* that the agreement was binding upon the adopted son, and that the son's proprietary right was subject to the interest thereby created in favour of his adoptive mother. *Chitko Raghunáth Rájádiksh* v. *Jánaki, widow of Raghunáth Rájádiksh, and others* ...199

CONFESSION—

1. The direction of Section 346 of the Code of Criminal Procedure, enjoining that an accused person shall sign the record of his confession, is not satisfied by the following:—"Signature of *A. B.* (the accused); the handwriting of *C. D.*" Where the conviction of a person was based upon a confession thus subscribed, the High Court reversed it, and held that the Session Judge was bound to prevent the production of such a confession. *Reg.* v. *Dayá Anand and Ranchod Khalpo* .....44

2. An accused person, whose signature to a statement made by him to the committing Magistrate is not taken as provided in Section 346 of the Code of Criminal Procedure, is not prejudiced thereby within the meaning of that section, unless he is unfairly affected as to his defence on the merits.

Where a prisoner in the Court of Session was represented by a pleader who had an opportunity to object to the admissibility of his statement, and did not, the High Court held that he was not prejudiced. *Reg.* v. *Devá Dayál* .....237

3. In the absence of evidence that a confession of an accused person has been induced by illegal pressure, it is not to be presumed that such confession was so induced.

According to Section 24 of the Indian Evidence Act, a confession is inadmissible only if the Court considers it to have been induced by illegal pressure. Where the Session Judge did not consider a confession to have been so induced, the High Court, upon a reference under Section 263 of the Code of Criminal Procedure:

*Held* it to have been properly admitted, and finding it to be full and clear, and supported by reliable evidence, acted upon it by convicting the person who made it, notwithstanding his retraction of it in the Court of Session, and his being found not guilty by the Jury. *Reg.* v. *Balvant* .....137

4. The confession of one of the prisoners cannot be used to corroborate the evidence of an accomplice against the others. *Reg.* v. *Malápá bin Kapaná and others* .....196

*See* ACT I. OF 1872, SECS. 27 AND 30. AMENDMENT OF CHARGES.

CONFIRMATION.—*See* RIGHTS OF PURCHASERS AT COURT SALES.

CONSEQUENTIAL RELIEF.—*See* DECLARATORY DECREE. SUIT FOR A DECLARATION OF RIGHT TO PROPERTY UNDER ATTACHMENT.

CONSIDERATION—

The consideration mentioned in a deed of sale by the parties thereto

must be regarded as showing the value of the interest conveyed for the purposes of registration under Act XX. of 1866. *Rohinee Debia* v. *Shib Chunder Chaterjee* (15 Calc. W. R. Civ. Rul. 558) followed. *Vásudev* v. *Ráma* .....149

CONTEMPT OF COURT—

For the purposes of Section 473 of the Criminal Procedure Code, an Assistant Session Judge is a different court from the Session Judge. Accordingly, an offence, which is committed in contempt of the Session Judge's authority, is cognisable by an Assistant Session Judge. *Reg.* v. *Gulábdás Kuberdás* .....98

CONVICTION BY HIGH COURT.—*See* CONFESSION, 3.

CONVICTION OF AN OFFENCE WITHOUT A SPECIFIC CHARGE.—*See* CRIMINAL PROCEDURE CODE, SEC. 457.

CO-PARCENER.— *See* UNDIVIDED HINDU FAMILY, 1, 2, 3.

CORROBORATION—

The evidence requisite for the corroboration of the testimony of an accomplice must proceed from an independent and reliable source, and previous statements made by the accomplice himself, though consistent with the evidence given by him at the trial, are insufficient for such corroboration.

The confession of one of the prisoners cannot be used to corroborate the evidence of an accomplice against the others. *Reg* v. *Malápá* .....196

COTTON FRAUDS.—*See* BOMBAY ACT IX. OF 1863, SEC. 2.

CRIMINAL PROCEDURE CODE—

SEC. 4—

To make a case a "session case" within the meaning of Section 4 of the Code of Criminal Procedure, it is not necessary that it should be triable exclusively by the Court of Session. *Reg.* v. *Gulábdás Kuberdás* .....98

SEC. 15 .....99

SECS. 17 AND 18.....101

SECS. 59 AND 60—

Whether or not a private complainant is permitted, under Section 59 of the Code of Criminal Procedure, to conduct a case as prosecutor, he may instruct counsel who shall be entitled to appear, under No. 7, Chapter XI. of the High Court Rules, and the Public Prosecutor may, thereupon, avail himself of the counsel's services under Section 60. *In re Náráyan M. Pendshé*.....102

SEC. 119—

Section 119 of the Code of Criminal Procedure not making it obligatory upon a police officer to reduce to writing any statements made to him during an investigation, neither that section, nor Section 91 of the Indian Evidence Act, renders oral evidence of such statements inadmissible. If the statements be actually reduced to writing, the writing itself cannot be treated as part of the record or used as evidence, but may be used for the purpose of refreshing memory under Section 159 of the Evidence Act. Consequently, the person making the statements may properly be questioned about them; and, with a view to impeach his credit, the police officer himself, or any other person in whose hearing the statements were made, can be examined on the point under Section 155 of the Evidence Act. *Reg.* v. *Uttamchand* .....120

SEC. 122 .....44
SEC. 141 .....171
SEC. 218.....124
SEC. 235—

The effect of Section 235 of the Code, read with Sections 59 and 60, is to make every case tried by the Court of Session a case falling within the provisions of Section 60, that is to say, the Public Prosecutor may always avail himself of the services of counsel retained by a private individual, and in so doing he does not deprive himself of the management of the case. *In re Nárayan M. Pendshe* ....102

SEC. 249—

The purpose of Section 249 of the Code of Criminal Procedure, as amended by Section 20 of Act XI. of 1874, is to make depositions given before Magistrates in the preliminary inquiry, evidence in the trial before the Court of Session, only when the Session Judge determines, in the exercise of his discretion, that they are to be used in this way. But the exercise of this discretion, considering it as a matter of fact or law, is open to review by the Appellate Court. *Reg.* v. *Arjun Meghá and another* .....281

SECS. 251 AND 252—

Where the assistance of counsel has once been accepted, that assistance is not excluded at the stages of the trial (summing up by the Prosecutor and his reply) to which Sections 25, and 252 apply. *In re Nárayan M. Pendshe* ...102

SEC. 256.—*See* PROCEDURE, 7...97, 279
SEC. 263—

According to Section 24 of the Indian Evidence Act, a confession is inadmissible only, if the Court considers it to have been induced by illegal pressure. Where the Session Judge did not consider a confession to have been so induced, the High Court, upon a reference under Section 263 of the Code of Criminal Procedure:

*Held* it to have been properly admitted, and finding it to be full and clear, and supported by reliable evidence, acted upon it by convicting the person who made it, notwithstanding his retraction of it in the Court of Session, and his being found not guilty by the Jury. *Reg.* v. *Balvant V. Pendhárkar* .....137

SEC. 272—

Under Section 272 of the Code of Criminal Procedure, as amended by Section 23 of Act XI. of 1874, an appeal against an acquittal presented by the Government six months after the date of the judgment complained of, is barred by lapse of time, even though the six months expired on the day the amending Act became law.

The amended Section 272 should be read by itself, and not as a clause of the ordinary statute of limitations. *The Government of Bombay. In the matter of Reg.* v. *Dorábji Bálábhái and others* ...117

SEC. 273 .....127
SEC. 283.—*See* MATERIAL ERROR.239
SEC. 294 .....119
SEC. 295 .....171
SEC. 296.—*See* SESSION CASE.
SEC. 297—

The Court will not, under Section 297 of the Code of Criminal Procedure, interfere with an acquittal. *The Government of Bombay. In the matter of Reg.* v. *Dorábji Bálábhái and others* .....117

*See* MATERIAL ERROR .....124
SEC. 300.—*See* MATERIAL ERROR.

SEC. 346—

1. The direction of Section 346 of the Code of Criminal Procedure, enjoining that the accused person shall sign the record of his confession, is not satisfied by the following:—" Signature of *A. B.* (the accused); the handwriting of *C. D.*" Where the conviction of a person was based upon a confession thus subscribed, the High Court reversed it, and held that the Session Judge was bound to prevent the production of such a confession. *Reg.* v. *Dayá Anand.* 44

2. An accused person whose signature to a statement made by him to the committing Magistrate is not taken as provided in Section 346 of the Code of Criminal Procedure, is not prejudiced thereby within the meaning of that section, unless he is unfairly affected as to his defence on the merits.

Where a prisoner in the Court of Session was represented by a pleader who had opportunity to object to the admissibility of his statement, and did not, the High Court held that he was not prejudiced. *Reg.* v. *Devá Dayál* ...237

*See* PROCEDURE, 7.

SEC. 347 .....99

SECS. 447 TO 449.—*See* AMENDMENT OF CHARGE.

SEC. 454 .....15

SEC. 457—

When a person is charged with an offence consisting of parts, a combination of some only of which constitutes a complete minor offence, he may, under Section 457 of the Code of Criminal Procedure, be convicted of the latter without being specifically charged, but only when the graver charge gives notice of all the circumstances going to constitute the minor offence.

Hence where a man charged with murder was convicted of abetment of it, the High Court annulled the conviction and sentence, and ordered him to be re-tried on the latter charge. *Reg.* v. *Chand Nur.* 240

SEC. 464.....124, 128

SEC. 470.— *See* PROCEDURE, 6

SEC. 473—

For the purposes of Section 473 of the Code, an Assistant Session Judge is a different court from the Session Judge. Accordingly, an offence which is committed in contempt of the Session Judge's authority is cognisable by an Assistant Session Judge. *Reg.* v. *Gulábdás Kuberdás* .....98

SEC. 491 ... .....172

SECS. 493 AND 502.—*See* RECOGNIZANCE BOND.

SEC. 530 .....171

CROSS-EXAMINATION OF A WITNESS AFTER HIS EXAMINATION BY THE COURT—

The principle that parties cannot, without the leave of the Court, cross-examine a witness whom, the parties having already examined or declined to examine, the Court itself has examined, applies equally whether it is intended to direct the cross-examination to the witness's statements of facts, or to circumstances touching his credibility, for any question meant to impair his credit, tends (or is designed) to get rid of the effect of each and every answer, just as much as one that may bring out an inconsistency or contradiction. Section 155 of Act I. of 1872. *Reg.* v. *Sakhárám Mukundji* ...166

CUMULATIVE SENTENCE—

Where the act of an accused person coupled with his intention or know-

ledge, constitutes a graver offence, the circumstance that the same act also answers to the definition of another less grave offence, does not render him liable to a cumulative punishment.

Case where different statutes provide separate punishments for the same act, distinguished. *Reg.* v. *Dod Basayá* .. .....13

DAMAGES—

1. A suit for damages may be brought by a person holding the office of village priest by prescription against an intruder who deprives him of the exercise and benefits of that office. *Vithal Krishna* v. *Anant* ..... 6

2. There is not any universal rule that a judgment-creditor is, or that he is not, liable in suit for a wrongful seizure, or for injury to the goods while under seizure. His liability must depend upon the circumstances of the case, *i.e.*, upon the fact whether the wrongful seizure or the injury is the result of his own conduct; for instance, if the judgment-creditor personally, or by his authorized agent (*ex. gr.*, his pleader), apply, under Section 214 of the Civil Procedure Code, for the attachment of property which is specially designated in that application, and if the Court grant its warrant for the seizure of that particular property, and the officer of the Court execute the warrant, and the property be not that of the judgment-debtor, the judgment-creditor would certainly be liable for that wrongful seizure, and the officer of the court could justify under the warrant, and would not be liable so long as he kept within the duty expressly prescribed for him by it.

But if the application of the judgment-creditor were for a general attachment under Section 218 of the Code, and the Court took no such security from him as it might take under that section, and if the Court granted a general warrant for the attachment of the moveable property of the judgment-debtor, and the officer of the Court, without any suggestion to that effect from the judgment-creditor or his agent beyond a general direction to execute the warrant, were to seize property not belonging to the judgment-debtor, the judgment-creditor would not be responsible.

*Quære.*—Whether under such circumstances as these last mentioned, the officer of the court would be responsible? *Vánú* v. *Hatá* .....46

DAMNUM ABSQUE INJURIA. 49,55

DECLARATORY DECREE—

Where a plaintiff sued for a declaration of his eligibility to the office of *Pátil*, if elected under the provisions of Act XI. of 1843, he having been obliged to sue to establish his eligibility in consequence of the defendant's persistent denial of the plaintiff's claim to such eligibility, whereby the revenue authorities were induced to refuse to recognise it:

*Held* that the suit was cognisable by a Civil Court.

*Held* also that such a suit would lie, even when the object of it was only to enable the plaintiff to influence the revenue authorities, by showing that the civil court had declared him eligible for office as *Pátil*. *Abáji Sankroji* v. *Niloji Báloji* (2 Bom. H. C. Rep. 324) and *Yesáji Apáji* v. *Yesáji Mháloji* (8 Bom. H. C. Rep. A. C. J. 35) distinguished. *Ningangavdá* v. *Satyangavdá* .....232

DECREE—

A notice or order to a judgment-debtor, *A*, not to pay the amount decreed to his judgment-creditor, *B*, will not in any case serve to keep the decree alive in favour of *C*, a judgment-creditor of *B*, at whose instance the notice or order is issued, much less in favour of other judgment-creditors of *B*, with whom *A* had nothing to do. The period during which a decree remains under attachment should not be deducted from the time within which proceedings must be taken for the execution of the decree: *Chandi Prasad Nandi* v. *Raghunath Dhar* (3 Beng. L. R. Appendix 52) dissented from.

An application for execution of the decree in the original suit and proceedings thereon, which, without formally and expressly asking for execution of the decrees in regular and special appeal, recognised those decrees, and sought relief consistent with the final decree, can be judicially recognised as a proceeding for the purpose of executing the final decree. *Mir Ajmuddin* v. *Mathurádás* .....206

*See* CIVIL PROCEDURE CODE, SECS. 209 AND 364.

DEFENDANT.—*See* JURISDICTION, 3. SUIT AGAINST A MINOR.

DISCREPANCIES—

Discrepancies are not less infirmative of testimony, because a greater sagacity on the part of witnesses would have avoided them. *Reg.* v. *Kálu Pátil and another* .....146

DISCRETION.—*See* CRIMINAL PROCEDURE CODE, SEC. 249.

DISOBEDIENCE TO NOTICE TO PRODUCE EVIDENCE.—*See* NOTICE TO PRODUCE EVIDENCE

DISTURBANCE OF OFFICE.—*See* DAMAGES, 1.

DUTY OF JUDGE TO PREVENT PRODUCTION OF INADMISSIBLE EVIDENCE.—*See* PROCEDURE, 7.

DYING DECLARATION—

The declaration of a dying person, albeit made on solemn affirmation before a Magistrate, who was not, however, the committing Magistrate, and signed by him, is not admissible in evidence without legal proof that the deceased made such a declaration. *Reg.* v. *Fatá Adáji* .....247

ESTOPPEL—

Where the defendant actively participated in the adoption of the plaintiff by the defendant's brother, and by many acts signified to the plaintiff and to his adopting father, the defendant's complete acquiescence in the adoption, and thereby encouraged the plaintiff, who was an adult, to assent to such adoption, and allowed the adopting father to die in the belief that the adoption was valid, and finally concurred in the performance, by the plaintiff, of the funeral ceremonies of his adopting father:

*Held* that the defendant was estopped from disputing the validity of the adoption. *Sadáshiv Moreshvar Ghâte* v. *Hari Moreshvar Ghâte* .....190

*See* HINDU LAW, 1. SUIT FOR A DECLARATION OF RIGHT TO PROPERTY UNDER ATTACHMENT.

EVIDENCE—

*A* and *B*, two undivided Hindu brothers, conveyed to their mother,

*C*, one-third share in the ancestral property of the family by a deed of sale, dated 29th August 1851. Subsequently *A* sold his one-third share in the joint ancestral property to *B* by a deed dated the 4th August 1852. In a suit brought by a judgment-creditor of *A* in 1868 to receive *A's* half share in the joint property from *B* and *C*, the plaintiff gave in evidence proceedings taken by *A* jointly with his brother, *B*, in 1856 against a third person, relating to the joint property, with a view to show that the two documents were illusory, and intended to screen *A's* share from execution by his creditors:

*Held* that such proceedings were important and relevant evidence, in order to test the *bonâ fides* with which *A* executed the two documents, as it was important to ascertain how *A* subsequently demeaned himself with regard to the property, his share or interest in which he purported to convey by those documents. *Girdhar Nágjishet* v. *Ganpat Morobá and Bhágirthibái kom Morobá* .....129

*See* ACT I. OF 1872, DYING DECLARATION.

EVIDENCE PROPERLY ADMITTED WITHHELD FROM THE JURY—

The statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, where the latter states he was, and saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point, Sections 5, 11, and 153 (Illustration C) of Act I. of 1872.

Where such a statement, after being admitted, was withheld from the Jury, the High Court ordered a new trial. *Reg.* v. *Sakhárám Mukundji* .....166

EVIDENCE OF ACCOMPLICE.—*See* ACT I. OF 1872, SECS. 30, 114, 133, AND 157.

EVIDENCE, MISAPPRECIATION OF.—*See* "MATERIAL ERROR."

EXECUTION.—*See* DECREE. INA'MDA'R, 1. RIGHTS OF PURCHASERS AT COURT SALES.

EXECUTION OF DECREE—

The Court, to which a decree is sent for execution by another court, has the power to take the same steps, including the issue of a notice under Section 216 of the Code of Civil Procedure, which it could take in execution of its own decree. *Chhaganlál Narbherám* v. *Jamnádás Manchárám*.....19

*See* DECREE.

EXECUTION CREDITOR.—*See* DAMAGES, 2. LIS PENDENS, 2, 3.

"EXPRESSLY"—

Where two documents were executed in the Island of Bombay, respectively, under date the 29th August 1851 and 4th August 1852, and did not appear to have been originally expressly intended to operate within any of the zillahs subordinate to the Presidency of Bombay:

*Held* that they did not come within the scope of Regulation XVIII. of 1827. That regulation being an enactment imposing stamp duties upon the subject, must be strictly construed, and although the High Court believed that those documents were actually intended to operate, so far as the particular

property in question in the suit was concerned, in the zillah of Tanna, the High Court declined to hold "expressly" to mean the same as "actually," as nothing appeared on the face of either of those documents to show where the property mentioned in them was situated. *Girdhar Nágjishet* v. *Ganpat Morobá and Bhágirthibái kom Morobá* .....129

EXTRAORDINARY JURISDICTION OF THE HIGH COURT.—*See* ACT XI. OF 1865, SEC. 6. CIVIL PROCEDURE CODE, SECS. 209 AND 364.

FALSE EVIDENCE—

In a non-judicial proceeding, the object of which is to discover the writer of a scandalous petition, it is not competent for the Magistrate conducting the proceeding to administer an oath.

The High Court reversed a conviction for giving false evidence where an oath was administered under the above circumstances. *Reg.* v. *Jibhái Vajá* .....11

*See* SESSION CASE.

FAMILY PROPERTY.—*See* UNDIVIDED HINDU FAMILY, 1, 2, 3.

FAMILY USAGE.—*See* HINDU LAW, 2.

FEES.—*See* DAMAGES, 1.

FORGERY—

1. *A* signed *B's* name to petitions presented by *C* to the Mámlatdár, requesting his summary assistance under Regulation XVII. of 1827, for the recovery of rents from *B's* tenants:

*Held* that even if *A* had no authority from *B* to sign his name, and if *A* wished to deceive the Mámlatdár into the belief that it was *B* himself who had signed the petitions, still, if there had been no intention to defraud anybody, or if no wrongful gain or wrongful loss could have been caused to *A* or *B*, *A's* act did not constitute forgery within the meaning of the Indian Penal Code. Avoidance of litigation is no wrongful loss to Government. *Reg.* v. *Bhaváni-shankar* .....3

2. Where a subsequent addition to a document, though unauthorised by the executant, serves only to state explicitly what is already implied in the document, and what the law would infer from it, such addition is immaterial, and does not vitiate the instrument. Interest at a penal rate should not be awarded if there be no demand for it, or for a sum by way of compensation for special damage, on the part of the plaintiff. *Tikamdás* v. *Gangá* .....203

*See* ACT I. OF 1872, SEC. 11.

"FORMER YEAR."—*See* JURISDICTION, 3.

GIVING FALSE EVIDENCE IN A JUDICIAL PROCEEDING.—*See* SESSION CASE.

GOVERNMENT ORDER.—*See* ASSESSMENT.

HIGH COURT RULE No. 7, CHAP. XI.—*See* RIGHT OF COUNSEL TO CONDUCT PROSECUTION.

HINDU LAW—

1. Where a Hindu widow in whom had vested by inheritance the whole of her husband's property, moveable and immoveable, agreed to accept a boy in adoption on an express his agreement by father

that during her lifetime she should be entitled to such property, subject, however, to the boy's maintenance and education, and, upon the faith of such agreement, adopted the boy, it appearing that she would not have done so at all if it had not been for such agreement:

*Held* that the agreement was binding upon the adopted son, and that the son's proprietary right was subject to the interest thereby created in favour of his adoptive mother. *Held* also that under the Hindu law the power exercised by a father in giving his son in adoption is not only co-extensive with the power of a guardian, but is more like the power of an absolute proprietor. *Chitko* v. *Jánaki* ,199

2. Among the members of the Utpát families of Pandharpur, in the Sholapur District, daughters are excluded from succession, by a long and uniform family usage.

Under Hindu law, a family usage or custom, when clearly proved, outweighs the written text of the law. But the greatest care must be exercised in accepting the alleged usage or custom as proved. When it is a family custom, the evidence must clearly show that it has been submitted to as legally binding, and not as a mere arrangement by mutual consent for peace or convenience.

Any special rule of inheritance proved to exist in a Hindu family, and which is ancient, uniform, and reasonable, and not repugnant to the fundamental principles of Hindu law, should not be refused recognition.

Origin and growth of the rights of inheritance of the widow and daughter by general Hindu Law considered. *Bháu Nánáji Utpát* v. *Sundrábái* .....249

*See* ADOPTION, 1, 2. MORTGAGE IN GUZERAT. MORTGAGE, 4. UNDIVIDED HINDU FAMILY, 3.

IMPLIED CONTRACT.—*See* ACT XI. OF 1865, SEC. 6.

INADMISSIBLE EVIDENCE.—*See* ACT I. of 1872, SEC. 11. PROCEDURE, 7.

INA'MDA'R—

1. The paramount rights of Government in respect of debts due to the Crown are not transferred to alienees (such as *Inámdárs*) of Government revenue.

If an *Inámdár* fails to recover his rents by any of the special processes provided in the Regulations, and is obliged to go into the civil court and obtain a decree for arrears, the sale of the land in execution of such a decree has the same effect (and no more) as a sale of land in execution of a decree for any other debt.

A mortgage deed, when registered, is valid without possession. *Bálāji Nárāyan* v. *Rámchandra* .....87

2. Government, by an indenture dated the 25th January 1819, conveyed to *A* and *B*, and their heirs and assigns, certain villages in the Island of Salsette, with the exception of such spots of *Shiloiri* tenure as might be therein, or on any part thereof, which could only become the property of *A* and *B*, on their purchasing the same from the proprietors. Since 1819 the holders of these *Shilotri* lands had paid to the grantees and their heirs assessment (or rent) at a fixed rate which, before the grant, they used

to pay to Government. In an action brought by an heir of *A* and *B* in 1868 to recover an enhanced rent or assessment levied on these lands:

*Held* that the effect of the exception in the Indenture of 1819 being to throw upon the plaintiff the burden of proving his right to enhance the rent (or revenue), which he had failed to do, and Regulation I. of 1808, Section 4, Clauses 1 and 2, containing admissions by Government (which then was the immediate landlord of the *Shilotridárs*) that Government itself had no such right, plaintiff was consequently not entitled to raise the rent.

*Held* also that though the language of the exception was so large that it might have been construed to exclude any right on the part of the grantees to receive rent (or revenue), yet that as the defendant or his predecessors had, ever since 1819, paid to the plaintiff and his predecessors the revenue paid before that time to Government, that revenue passed under the Indenture of 1819 to the grantees in the deed. *Dádibhái* v. *Rámji*...162

*See* NOTICE OF ENCHANCEMENT OF RENT.

INA'M LANDS, SUIT FOR POSSESSION OF.—*See* JURISDICTION, 2.

INDIAN PENAL CODE—

SEC. 152 .....120

SEC. 161 .....126

SEC. 174 ..... .....231

SEC. 182 ..... ..... ..... 6

SEC. 193—*See* FALSE EVIDENCE. PROCEDURE, 1.

SECS. 230 AND 231—

The test of whether a coin is money or not, is the possibility of taking it into the market and obtaining goods of any kind in exchange for it. For this its value must be be ascertained and notorious: *Held*, therefore, that to counterfeit a coin of the Emperor Akabar's time was not an offence under Sections 230 and 231 of the Indian Penal Code. *Reg.* v. *Bápu Yádav* .....172

SEC. 323 .....120

SEC. 395 .....146

SEC. 426 ..... 14

SECS. 435 AND 436.—*See* CUMULATIVE SENTENCE.

SEC. 464.—*See* FORGERY, 1.

SEC. 471 ..... 6

INTENTION COUPLED WITH ACT.—*See* CUMULATIVE SENTENCE.

INTENTION TO DEFRAUD.—*See* FORGERY, 1.

INTEREST AT A PENAL RATE—

Interest at a penal rate should not be awarded if there be no demand for it, or for a sum by way of compensation for special damage on the part of the plaintiff. *Tikamdás Javáhirdás* v. *Gangá kom Mathurádás* .....203

JOINT FAMILY PROPERTY.—*See* MORTGAGE, 4.

"JOINTLY TRIED."—*See* ACT I. OF 1872, SEC. 30.

JURISDICTION—

1. A puisne attaching judgment-creditor for a sum under Rs. 5,000 applied to a Subordinate Judge, under Section 256 of the Civil Procedure Code, to have a sale, made in a suit brought in his court, by a senior attaching judgment-creditor, for a sum above Rs. 5,000, set aside. The application was refused, on the ground of want of

jurisdiction, as the applicant was not a party to the suit, and the sale was accordingly confirmed.

On regular appeal to the High Court:

*Held* that the term "applicant" in Section 256 is not confined to the parties to the suit, but also includes any person who has sustained substantial injury by reason of any material irregularity in publishing or conducting the sale.

*Held* also that, although the applicant was creditor for a sum less than Rs. 5,000, still, as the sale took place in a suit for a sum above Rs. 5,000, an appeal lay to the High Court. Some of the dicta in *Joge Narian Singh* v. *Bhugbano* (2 Calc. W. R. Mis. Rul. 13); *Luchmeeput Singh Doorgur* v. *Mooktakushee Depia* (9 *Ibid.* Civ. Rul. 388), and *Rae Sitaram* v. *Balkrishna Tewaree* (1 S. D. A. Rep. 377 N.-W. P.) referred to and dissented from. *Krishnarâv Venkatesh* v. *Vâsudev Anant*.....15

2. Bombay Act III. of 1863, Section 3 deprives the civil courts of jurisdiction in respect of all claims against Government on account of *Inâms*; in other words, claims referring to total or partial exemption from the payment of Government revenue, but it does not deprive the civil courts of jurisdiction in respect of claims to recover possession of *Inâm* lands. *Shidmal* v. *W. Anderson* .....39

3. The expression "or former year" in Regulation XVII. of 1827, Section 31, Clause 3, does not mean the year immediately preceding the current year, but any previous year, and a suit for rent could have been brought before a Revenue Officer, when Act XI. of 1865 was passed, and not before the Small Cause Courts constituted by that Act. A special appeal lay in a suit of this nature.

Payment of rent by the lessee to one of several joint lessors, and at his request, discharges the debt as to all; as also payment made at his request to one of several joint creditors. Where one of several joint-creditors, who has no rights separate from those of the others, refuses to join in the suit as plaintiff, and there is no averment of collusion on his part with the defendant, he cannot rightly be joined as a defendant. *Krishnârâv* v. *Mânâji* .....106

*See* ACT XI. OF 1865, SEC. 6. RECOGNIZANCE BOND. SESSION CASE.

LACHES.—*See* RIGHTS OF PURCHASERS AT COURT SALES.

LAND REVENUE.—*See* INA'MDA'R, 1, 2.

LEGAL SHARER, SUIT BY.—*See* MUHAMMADAN LAW.

LESSOR AND LESSEES—*See* JURISDICTION, 3.

LIABILITY OF A DIVIDED SHARE IN THE HANDS OF THE HEIR FOR THE DEBTS OF THE DECEASED—

The divided share of a Hindu in property which previously belonged to the united family, is, after his decease, and while yet in the hands of his heir, assets for payment of the debts of the deceased.

The proposition of Hindu law, that debts follow the assets into whosesoever hands they come, must, generally speaking, be confined to

separate estate, and the liability of undivided ancestral estate, in the hands of sons and grandsons, to the debts of the father or grandfather is exceptional. *Udarám Sitárám* v. *Rânu Pánduji and Venku Pánduji* .....76

LIABILITY OF THE ANCESTRAL ESTATE FOR THE SEPARATE DEBT OF A DECEASED CO-PARCENER IN AN UNDIVIDED HINDU FAMILY—

The whole of the family undivided estate would generally, when in the hands of the sons or grandsons, be liable for the debts of the father or grand-father, and previously to the passing of Bombay Act VII. of 1866, the sons and grandsons were personally liable for the debts of the father or grandfather, whether they received assets or not. But there is no authority for the converse, viz., that the father or grandfather is responsible for the debts of his son or grandson, independently of the receipt of assets, unless he promise payment.

The proposition of Hindu law that debts follow the assets into whosesoever hands they come, must, generally speaking, be confined to separate estate, and the liability of undivided ancestral estate, in the hands of sons and grandsons, to the debts of the father or grandfather is exceptional.

Undivided family property is not in the hands of surviving co-parceners, generally speaking, liable to the separate debt of a deceased co-parcener.

Where, therefore, a Hindu undivided in estate from his father, died separately indebted to the plaintiffs, who obtained a decree against the father and wife of the deceased, as his legal heirs and representatives, to recover from the estate and effects of the deceased, the amount of their debt and costs, and sought, in satisfaction of the decree, to attach a shop, which during the lifetime of the deceased and subsequently to his death, had been in the possession of his father, there being no proof of any separate estate of the deceased having devolved upon his father: *Held* that, though the son was, during his life, jointly interested with his father in the shop as being ancestral property, his right had come into existence at his birth and died with him, and therefore the plaintiffs could not render the shop available for their claim. *Udarám Sitárám* v. *Rânu Pánduji and Venku Pánduji* .....76

LIABILITY OF EXECUTION CREDITOR IN DAMAGES FOR WRONGFUL SEIZURE.—*See* DAMAGES, 2.

LIMITATION—

1. Where a person, claiming to hold land free of Government assessment, was compelled by the Collector to pay the same, and afterwards brought his suit to establish his right:

*Held* that the cause of action first arose and the right was actually interfered with by the Collector compelling payment of the rent; and that as the suit was brought within 12 years from that date, it was not barred, but that only one year's arrears were recoverable under Act XIV. of 1859, Section 1, Clause 4. *Bhujang Mahádev* v. *Collector of Belgaum* .....1

2. In 1848 two members of an undivided Hindu family mortgaged

some land forming a portion of the ancestral estate. The mortgagee, having obtained a decree in 1856 on his mortgage, caused 20 *guntas* of the mortgaged land to be attached and sold, on account of the right and interest of one of the mortgagors only, on 24th January 1871. In a suit brought by the purchaser against a third member of the undivided family, in whose possession the 20 *guntas* then were, to recover the same from him, as being the property of the mortgagor, whose right and interest therein had been attached and sold:

*Held*, 1*st*.—That the purchaser could take no more than the share of the co-parcener, whose interest alone had been attached and sold, though this share might be defined as it existed at the time of the mortgage made by him in 1848.

2*nd*.—That as between the purchaser and the defendant, in determining whether the latter had been in sole and exclusive possession for a period sufficient to bar the right of the former, the rule of limitation applicable is that which would have been applied between the co-parcener whose interest had been sold and the defendant, had the former been suing for possession of the land or a portion of it. *Pándurang Anandráv* v. *Bháskar Shaláshiv* .....72

3. The Limitation Act IX. of 1871 comes into operation from 1st July 1871 with respect to appeals and applications, and is not controlled by the General Clauses Act I. of 1868, Section 6.

An application for execution of a decree being made on the 27th September 1871, *Held* not to be a suit within the meaning of Section 1 Clause (a) of Act IX. of 1871, and, therefore, barred under Schedule II. No. 167 of that Act, as having been made more than three years after the date of the last preceding application.

The application of the 27th September 1871 cannot be regarded as a mere continuation of a proceeding pending, viz., of the last preceding application of the 7th January 1868, within the meaning of Act I. of 1868, Section 6, at the time when the new Limitation Act came into operation, though the order on the latter application having been made on the 31st March 1870, would possibly have been a sufficient proceeding within the 20th Section of Act XIV. of 1859, to constitute a fresh terminus, whence time might run under that Act. *Govind Laxuman* v. *Náraycn Moreshwar* .....111

4. Under Section 272 of the Code of Criminal Procedure, as amended by Section 23 of Act XI. of 1874, an appeal against an acquittal presented by the Government six months after the date of the judgment complained of, is barred by lapse of time, even though the six months expired on the day the amending Act became law.

The amended Section 272 should be read by itself, and not as a clause of the ordinary Statute of Limitations.

The Court will not, under Section 297 of the Code of Criminal Procedure, interfere with an acquittal. *Reg.* v. *Dorábji Bálábhái* .....117

*See* ACT IX. OF 1871, SCH. II., ART. 75. CIVIL PROCEDURE CODE, SEC. 269.

LIS PENDENS—

1. A sale or mortgage *pendente lite* is invalid as against the plaintiff, and the vendor or mortgagor is under a disability to give any valid possession as against the plaintiff in the pending suit, to the party who becomes a purchaser or mortgagee during the pendency of the suit, whether or not the purchaser or mortgagee *pendente lite* has knowledge of the prior sale or mortgage as to which the litigation is pending or of the litigation itself. *Kasim Shaw* v. *Unodapersad Chatterjee* (1 Hyde 160) and *Manual Fruval* v. *Sanapalli Latchmidevamma* (7 Mad. H. C. Rep. 104) followed. *Báláji Ganesh* v. *Khushálji* .....24

2. The rule *pendente lite nihil innovetur* is in force in British India.

Therefore, where the owner of a house, during the pendency of a suit by an unregistered mortgagee for foreclosure and sale, mortgaged the same house by a registered mortgage to another person, *it was held* that the last mentioned mortgagee had no title as against the purchaser under a decree for sale in the suit, although such purchaser was the plaintiff in the suit.

A grantee or vendee of the defendant, becoming such during the pendency of the suit, need not be made a party to the suit, and, inasmuch as the first above-mentioned rule does not rest upon the equitable doctrine as to notice, it is a matter of indifference whether or not, at the time of his becoming grantee or vendee, he had actual notice of the existence of the suit. *Gulábchand Mánikchand* v. *Dhondi valad Bhán* ...64

3. On the 31st August 1863, *A* mortgaged his house to *B*, who brought a foreclosure suit, and on the 7th July 1866, obtained a decree against *A* for the sale of the house, if the mortgage debt was not paid on or before the 24th March 1868. The debt not having been paid, the house was sold at a Court's sale on the 15th July 1870, and purchased by *C*. In an action brought by the plaintiff to recover possession of the house on the ground that he had purchased it on the 2nd August 1868 at an execution sale under a common money decree against *A*:

*Held* that the plaintiff's sale was subject, not only to the mortgage of 1863, but also to the decree upon it under which the right, title, and interest of the mortgagor *A*, passed in 1870 to *C*, whose purchase was entitled to preference to the plaintiff's purchase in 1868.

*Held further* that if there had been no decree in the mortgage suit, the fact that that suit had been instituted in 1866, and was pending in 1868, would have been sufficient to defeat the plaintiff's suit; his purchase in 1868, having been made *pendente lite*, was completely subject to any decree which might be made in the mortgage suit. *Rávji Náráyan* v. *Krishnáji Lakshman* .....139

MAGISTRATE.—*See* RECOGNIZANCE BOND.

MATERIAL ERROR—

The expression "material error" in Section 297 of the Code of Criminal Procedure does not include error in appreciating evidence, and the High Court, which, as a Court of revision, is as much bound as a Court of Appeal by the provisions of Section 283 of the Code extended by Section 300, will not

be justified in rectifying an error merely in the appreciation of evidence, nor, even an error in law, unless it be shown to the Court that such error has caused a failure of justice. *Reg.* v. *Sakhárám Manohar* .....125

MAXIMS—

*Pendente lite nihil innovetur* .....66

*Tempus non currit contra non valentem agere*.....212

MINOR.—*See* SUIT AGAINST A MINOR.

MISAPPRECIATION OF EVIDENCE.—*See* "MATERIAL ERROR."

"MIXING."—*See* BOMBAY ACT IX. OF 1863, SEC. 2.

MONEY—

The test of whether a coin is money or not, is the possibility of taking it into the market, and obtaining goods of any kind in exchange for it. *Reg.* v. *Bápu Yádav* .....172

MORTGAGE—

1. A sale or mortgage *pendente lite* is invalid as against the plaintiff, and the vendor or mortgagor is under a disability to give any valid possession as against the plaintiff in the pending suit, to the party who becomes a purchaser or mortgagee during the pendency of the suit, whether or not the purchaser or mortgagee *pendente lite* has knowledge of the prior sale or mortgage as to which the litigation is pending or of the litigation itself. *Kasim Shaw v.* Unodapersad *Chatterjee* (1 Hyde 160) and *Manual Fruvel v. Sanapally Latchmidevamma* (7 Mad. H. C. Rep. 104) followed. *Báláji Ganesh* v. *Khushálji, son and heir of Bahiroji* ..... 24

2. Where a village, without specification of boundaries, is mortgaged as a whole, the mortgagee is, on the one hand, entitled to it as a security with any casual increase or decrease which may occur to it; and is, on the other hand, subject to its redemption by the mortgagor to the same extent. *Sadáshiv Anant* v. *Vithal Anant*.....32

3. The rule *pendente lite nihil innovetur* is in force in British India.

Therefore, where the owner of a house, during the pendency of a suit by an unregistered mortgagee for foreclosure and sale, mortgaged the same house by a registered mortgage to another person, *it was held* that the last mentioned mortgagee had no title as against the purchaser under a decree for sale in the suit, although such purchaser was the plaintiff in the suit.

A grantee or vendee of the defendant, becoming such during the pendency of the suit, need not to be made a party to the suit, and, inasmuch as the first above-mentioned rule does not rest upon the equitable doctrine as to notice, it is a matter of indifference whether or not, at the time of his becoming grantee or vendee, he had actual notice of the existence of the suit. *Gulábchand* v. *Dhondi* .....64

4. Where joint family property is mortgaged by one parcener, in order that it may bind the other co-parceners, the mortgagee must prove *affirmatively* that the mortagage was assented to by the other co-parceners, or was necessary for family purposes.

A mortgage deed, which was executed in March 1858, provided for the redemption of the mortgaged property after the expiration of

15 years from date. In a suit brought in 1867 to recover part of this property, the lower Appellate Court held the plaintiff entitled to recover, because on the 29th November 1873, when that court passed its decision, the time fixed for redemption in the mortgage deed had already expired:

*Held*, in special appeal, in reversal of the decree of the lower court, that in 1867, when the suit was brought, the right even to redeem the mortgaged property had not accrued, and that, therefore, the action was premature. *Lilá Morji* v. *Vásudev Moreshvar* ..... 283

*See* RIGHTS OF A PREVIOUS MORTGAGEE.

MORTGAGE IN GUZERAT—

The rule of Hindu law that a mortgage with possession takes precedence of a mortgage of a prior date, but unaccompanied by possession does not apply to Guzerat.

Where in Guzerat the defendant, a puisne mortgagee in possession, had notice of plaintiff's prior mortgage, the defendant was held not entitled to claim the benefit of the above rule of Hindu law.

Registration could not of itself alter this rule of Hindu law except so far as effect may be given to it by statute, and registration secures the same object which the Hindu law intended to secure by requiring possession, viz., notice to subsequent incumbrancers of the existence of a prior incumbrancer.

The purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation, as regards such subsequent incumbrances, as if he had been himself the mortgagor: he cannot set up against such subsequent incumbrances either a prior mortgage of his own, or a mortgage which he or the mortgagor may have got in. *Itchárám Dayárám* v. *Rájji Jagá* .....41

MORTGAGE BY SOME OF THE CO-PARCENERS OF A PORTION OF THE UNDIVIDED ESTATE.—*See* UNDIVIDED HINDU FAMILY, 2.

MORTGAGE LIEN.—*See* INA'MDA'R, 1.

MORTGAGE OF A VILLAGE WITHOUT SPECIFICATION OF BOUNDARIES.—*See* MORTGAGE, 2.

MORTGAGEE IN POSSESSION FOR VALUABLE CONSIDERATION WITHOUT NOTICE.—*See* LIS PENDENS, 1.

MOTHER OF A MINOR.—*See* CERTIFICATE OF ADMINISTRATION, 2.

MUHAMMADAN LAW—

A suit by a Muhammadan widow (legal sharer) against her sons (residuaries) for her share of the property left by her deceased husband, is no bar to a suit being brought by some of the song against the others for their sharess *Imám* v. *Kásim* .....104

MUTUAL RELATIONS OF DECREE IN ORIGINAL SUIT, REGULAR AND SPECIAL APPEALS, AND OF EXECUTION THEREON.—*See* DECREE.

NEW TRIAL.—*See* ACT I. OF 1872, SEC. 5.

NON-JUDICIAL PROCEEDING.—*See* PROCEDURE, 1.

NOTICE—*See* LIS PENDENS, 1, 2. MORTGAGE IN GUZERAT, PROCEDURE, 3.

NOTICE OF ENHANCEMENT OF RENT.—

An *Inámdár* is not entitled to recover an increased rent if he has given notice of such increase in December 1870 for the current year, 1870-71. *Hari Yemáji* v. *Parsharám Gundo* .....23

NOTICE TO PRODUCE EVIDENCE—

To render a person liable for disobedience of a notice under Section 15 of Bombay Act IV. of 1868, it is necessary that the documents required for inspection should be therein specified.

Disobedience of an order to produce evidence under Section 14 of Bombay Act I. of 1865, clause 1, does not render a person liable to criminal prosecution, but simply to an adjudication in his absence. *Reg.* v. *Mánikrám* .....231

OATH.—*See* PROCEDURE, 1.

OBJECTION ON THE MERITS—

An objection to the validity of a document under Regulation XVIII. of 1827, as distinguished from its inadmissibility in evidence, or from a prohibition to courts of justice or public officers to act upon it, is an objection on the merits under Act VIII. of 1859. *Girdhar Nágjishet* v. *Ganpat Morobá and Bhágirthibái kom Morobá* .....129

OBJECTION TO THE VALIDITY OF A DOCUMENT.—*See* REGULATION XVIII. OF 1827, SEC. 10.

ONUS PROBANDI—

Where joint family property is mortgaged by one parcener, in order that it may bind the other co-parceners, the mortgagee must prove *affirmatively* that the mortgage was assented to by the other co-parceners, or was necessary for family purposes. *Lilá Morji* v. *Vásudev Moreshvar*.....283

OPTIONAL REGISTRATION.—*See* CONSIDERATION.

"OTHER PERSON."—*See* ACT X. OF 1865, SEC. 50.

PARAMOUNT RIGHTS OF GOVERNMENT WITH RESPECT TO LAND REVENUE—

The paramount rights of Government in respect of debts due to the Crown are not transferred to aliences (such as *Inámdárs* of Government revenue. *Bálaji Náráyan Kolatkar* v. *Ramchándra Ganesh Kelkar* .....37

PARTITION—

1. One member of an undivided family cannot sue his co-parceners for a declaration that he is entitled to recover the whole of a family *Varshásan*. The only mode in which, as between the members of the joint family, a declaration of right to the *Varshásan* can be properly obtained is by one of the co-parceners bringing a suit for partition of the whole of the family estate, including the *Varshásan*, and for a declaration of the shares of the respective co-parceners. *Trimbak Dixit* v. *Náráyan Dixit* .....69

2. In 1848 two members of an undivided Hindu family mortgaged some land forming a portion of the ancestral estate. The mortgagee, having obtained a decree in 1856 on his mortgage, caused 20 *guntas* of the mortgaged land

to be attached and sold, on account of the right and interest of one of the mortgagors only, on 24th January 1871. In a suit brought by the purchaser against a third member of the undivided family in whose possession the 20 *guntas* then were, to recover the same from him, as being the property of the mortgagor, whose right and interest therein had been attached and sold:

*Held* that the share of a co-parcener being in the estate as a whole and not in any particular part of it, can be ascertained only by taking a general account of the whole estate, and making a distribution in accordance with the results of such account. In taking such account, however, and in making the consequent distribution, it would be only equitable that the share of the co-parcener who affected to deal with a portion of the land as if empowered to mortgage it, should, *ceteris paribus*, if the purchaser takes his place, be so made up as to embrace wholly, or so far as possible, the land which the purchaser bought as belonging to such co-parcener.

*Held also* that to obtain possession of the land purchased by himself, the purchaser must file against the other members of the family a partition suit for the ascertainment of the share of the co-parcener whose interest he has purchased, as it stood in 1848, and for the allotment to himself of that share so far as it can legally and equitably be identified with the land purchased by himself, and that, consequently, the suit in its present form will not lie. *Pándurang Anandráv* v. *Bhúskar Shadáshiv* .....72

3. If the mortgage or sale be of a special portion of the family property and possession of such portion can, on partition, be given to the mortgagee or purchaser, without injustice to prior incumbrancers or to co-parceners, it is the duty of the court making the partition to give effect to the mortgage or sale, and so to marshal the family property among the co-parceners as to allot that portion, or so much of it as may be just, to the mortgagee or purchaser.

*Quære.*—Whether, in the event of it being impossible, consistently with the rights of others, to give possession of the portion mortgaged or sold to the mortgagee or purchaser, he would be entitled to be recouped out of such other portion as might, on partition, be allotted to the parcener whose share in the special portion had been mortgaged or sold. *Udarám Sitárám* v. *Ránu Pánduji and Venku Pánduji*.....76

PA'TIL.—*See* DECLARATORY DECREE.

PAYMENT BY A LESSEE TO ONE OF SEVERAL JOINT LESSORS—

Payment of rent by the lessee to one of several joint lessors, and at his request, discharges the debt as to all, as also payment made at his request to one of several joint creditors. *Krishnaráv Rámchandra and another* v. *Mánáji bin Sayáji and another* .....106

PENALTY FOR DISOBEDIENCE TO NOTICE TO PRODUCE EVIDENCE.—*See* NOTICE TO PRODUCE EVIDENCE, 1.

PERJURY.—*See* PROCEDURE, 1.

PLAN—

That a witness says that a plan was prepared in his presence is not a sufficient reason for admitting the

plan in evidence, unless the witness also says that to his own knowledge the plan is correct. *Reg.* v. *Jorá Hasji* .....242

PLEADING—

Where one of several joint-creditors, who has no rights separate from those of the others, refuses to join in the suit as plaintiff, and there is no averment of collusion on his part with the defendant, he cannot rightly be joined as a defendant. *Krishnaráv Rámchandra and another* v. *Mánáji bin Sayáji and another*..... 106

*See* PARTITION.

POSSESSION—

The rule of Hindu law that a mortgage with possession takes precedence of a mortgage of a prior date, but unaccompanied by possession does not apply to Guzerat.

Where in Guzerat the defendant, a puisne mortgagee in possession, had notice of plaintiff's prior mortgage, the defendant was held not entitled to claim the benefit of the above rule of Hindu law.

Registration could not of itself alter this rule of Hindu law, except so far as effect may be given to it by statute, and registration secures the same object which the Hindu law intended to secure by requiring possession, viz, notice to subsequent incumbrancers of the existence of a prior incumbrancer.

The purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation, as regards such subsequent incumbrances, as if he had been himself the mortgagor, he cannot set up against such subsequent incumbrances either a prior mortgage of his own, or a mortgage which he or the mortgagor may have got in. *Itchárám Dayárám* v. *Ráiji Jagá* .....41

*See* CIVIL PROCEDURE CODE, SEC. 269.

INA'MDA'R, 1. LIS PENDENS, 1.

POSSESSION UNDER A SUBSEQUENT MORTGAGE CREATED DURING THE PENDENCY OF A SUIT BY A PRIOR MORTGAGEE.—*See* LIS PENDENS, 1.

POWER TO ADMINISTER OATH—

In a non-judicial proceeding, the object of which is to discover the writer of a scandalous petition, it is not competent for the Magistrate, conducting the proceeding, to administer an oath. The High Court reversed a conviction for giving false evidence where an oath was administered under the above circumstances. *Reg.* v. *Jibhái Vajá* .....11

POWERS OF THE HIGH COURT.—*See* "MATERIAL ERROR."

PREJUDICE.—*See* CRIMINAL PROCEDURE CODE, SEC. 346.

PRESCRIPTIVE RIGHT OF INA'MDA'RS TO RECOVER FROM SHILOTRIDA'RS THE REVENUE FORMERLY PAID BY THE LATTER TO GOVERNMENT.—*See* SHILOTRI LANDS.

PRIORITY.—*See* LIS PENDENS, 1.

PRISONERS JOINTLY TRIED.—*See* AMENDMENT OF CHARGE.

PROCEDURE—

1. In a non-judicial proceeding, the object of which is to discover the writer of a scandalous petition, it

is not competent for the Magistrate conducting the proceeding to administer an oath.

The High Court reversed a conviction for giving false evidence where an oath was administered under the above circumstances. *Reg.* v. *Jibhái*..... 11

2. A puisne attaching judgment-creditor for a sum under Rs. 5,000 applied to a Subordinate Judge, under Section 256 of the Civil Procedure Code, to have a sale made in a suit brought in his court by a senior attaching judgment-creditor, for a sum above Rs. 5,000, set aside. The application was refused on the ground of want of jurisdiction, as the applicant was not a party to the suit, and the sale was accordingly confirmed.

On regular appeal to the High Court:

*Held* that the term "applicant" in Section 256 is not confined to the parties to the suit, but also includes any person who has sustained substantial injury by reason of any material irregularity in publishing or conducting the sale.

*Held also* that, although the applicant was creditor for a sum less than Rs. 5,000, still, as the sale took place in a suit for a sum above Rs. 5,000, an appeal lay to the High Court.

Some of the dicta in *Joge Narian Singh* v. *Bhugbano* (2 Calc. W. R. Mis. Rul. 13); *Luchneeput Singh Doorgur* v. *Mooktakashee Debia* (9 *Ibid.* Civ. Rul. 388) and *Rae Sitaram* v. *Balkrishna Tewaree* (1 S. D. A. Rep. 377, N.-W. P.) referred to and dissented from. *Krishnarav* v. *Vásudev* .....15

3. The court to which a decree is sent for execution by another court has the power to take the same steps, including the issue of a notice under Section 216 of the Code of Civil Procedure, which it could take in execution of its own decree. *Chhaganlál* v. *Jamnádás*.....19

4. Section 2 of Act XX. of 1864 does not prohibit a person having a claim against a minor from bringing a suit until a certificate of administration has been granted. He may properly bring his suit, but immediately after his doing so, he should apply to the District Judge for the appointment of an administrator, and it is competent to the District Judge, under Section 8 of the Act to make that appointment. *In re Motirám Rupachand*.....21

5. An order for the issue of a certificate of administration to a particular person ought not to be made till it is ascertained whether that person is willing to take it.

Course pointed out where no relative or friend of a minor can be found willing to take such a certificate. *Bábáji bin Kusáji* v. *Máruti*....182

6. When it is intended to charge a person with having made a false statement in the court of a Magistrate or (alternatively) a false statement in the court of a Subordinate Judge, there must be a proper sanction for a prosecution on each branch of the alternative.

A sanction for a prosecution under Section 470 of the Criminal Procedure Code must designate the court where the false statement was alleged to have been made and the occasion on which it was committed.

It is desirable, if not necessary, that in the sanction for prosecution the description of the offence intended to be prosecuted should be stated in general terms, although details may be omitted. *In re Bálúji Sitárám* .....34

7. The direction of Section 346 of the Code of Criminal Procedure, enjoining that an accused person shall sign the record of his confession, is not satisfied by the following:—"Signature of *A.B.* (the accused); the handwriting of *C.D.*" Where the conviction of a person was based upon a confession thus subscribed, the High Court reversed it, and held that the Session Judge was bound to prevent the production of such a confession. *Reg.* v. *Dayá Anand.*44

*See* CIVIL PROCEDURE CODE. CRIMINAL PROCEDURE CODE. SUIT FOR A DECLARATION OF RIGHT TO PROPERTY UNDER ATTACHMENT.

"PROCEEDING."—*See* ACT IX. OF 1871, SEC. 1, CL. (a).

PROPERTY OF PURCHASER AT REVENUE SALE—

The purchaser at a revenue sale, held in default of the payment of assessment, takes free of all incumbrances, although the revenue authorities, without otherwise depriving the defaulter of his right of occupancy, under Section 36 of of the Bombay Survey Act I. of 1865, have only sold his right, title, and interest. *Abdul Gani* v. *Krishnáji Bhikáji* (10 Bom. H. C. Rep. 416) and *Gundo Shidheshvar* v. *Mardan Sáheb* (*Id. Ib.* 419) followed.

What operates to create the property recognized as a right of occupancy is the revenue sale and the consequent entry of the occupant's name in the Collector's books. A memorandum, therefore, declaring a person to be the successful bidder at the sale is not an instrument creating or declaring an interest in immoveable property and requiring registration under Section 18 of Act XX. of 1866.

The Collector may be responsible to the mortgagee of a revenue defaulter for refusing to accept the tender made by him of the Government rent, but if he does refuse it, and the land is sold, the title of the purchaser is unimpeachable. *Ghelábhái* v. *Pránjivan* .....218

"PROVED."—*See* RECOGINZANCE BOND.

PUBLIC PROSECUTOR.—*See* RIGHT OF COUNSEL TO CONDUCT PROSECUTION.

PURCHASER AT COURT SALE.—*See* RIGHTS OF PURCHASERS AT COURT SALES. UNDIVIDED HINDU FAMILY, 2.

PURCHASER AT REVENUE SALE.—*See* PROPERTY OF PURCHASER AT REVENUE SALE.

PURCHASER OF EQUITY OF REDEMPTION WITH NOTICE OF A SUBSEQUENT INCUMBRANCE.—*See* MORTGAGE IN GUZERAT.

RECOGNIZANCE BOND—

A Magistrate has no jurisdiction to call on a person who has entered into a recognizance bond, under Section 493 of the Code of Criminal Procedure, to pay the penalty or show cause why he should not do so, without previous *primâ facie* proof, by which is meant evidence on oath, that it has been forfeited,

Section 502 of the Code of Criminal Procedure. *In re Hariram*.....170

REDEMPTION—

A mortgage deed, which was executed in March 1858, provided for the redemption of the mortgaged property after the expiration of 15 years from date. In a suit brought in 1867 to recover part part of this property, the lower Appellate Court held the plaintiff entitled to recover, because, on the 29th November 1873, when that court passed its decision, the time fixed for redemption in the mortgage deed had already expired:

*Held* in special appeal, in reversal of the decree of the lower court, that in 1867, when the suit was brought, the right even to redeem the mortgaged property had not accrued, and that therefore the action was premature. *Lilá Morji* v. *Vásudev Moreshvar* ..... 283

*See* MORTGAGE, 2.

REGISTRATION—

1. A mortgage deed, when registered, is valid without possession. *Báláji Náráyan Kolátkar* v. *Rámchandrá Ganesh Kelkar* .....37

2. What operates to create the property recognized as a right of occupancy is the revenue sale and the consequent entry of the occupant's name in the Collector's books. A memorandum, therefore, declaring a person to be the successful bidder at the sale is not an instrument creating or declaring an interest in immoveable property and requiring registration under Section 18 of Act XX. of 1866. *Ghelabhái Bhikáridás* v. *Pránjivan Ichhárám*..... 218

*See* CONSIDERATION. MORTGAGE IN GUZERAT.

REGULATIONS (BOMBAY)—

No. I. OF 1808, SEC. 4.—*See* SHILOTRI LANDS.

SEC. 36 .....163
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SEC. 31, CL. 3—

The expression "or former year" in Regulation XVII. of 1827, Section 31, Clause 3, does not mean the year immediately preceding the current year, but any previous year, and a suit for rent could have been brought before a Revenue officer, when Act XI. of 1865 was passed, and not before the Small Cause Courts constituted by that Act. A special appeal lay in a suit of this nature. *Krishnaráv Rámchandra and another* v. *Mánáji bin Sayáji and another* .....106

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No. XVIII. OF 1872 SEC. 10, ET SEQ.—

An objection to the validityof a document under Regulation XVIII. of 1827, as distinguished from its inadmissibility in evidence, or from a prohibition to courts of justice or public officers to act upon it, is an objection on the merits under Act VIII. of 1859.

Where two documents were executed in the Island of Bombay, respectively, under date the 29th August 1851 and 4th August 1852, and did not appear to have

been originally *expressly* intended to operate within any of the zillahs subordinate to the Presidency of Bombay, *Held* that they did not come within the scope of Regulation XVIII. of 1827. That Regulation, being an enactment imposing stamp duties upon the subject, must be strictly construed, and although the High Court believed that those documents were *actually* intended to operate, so far as the particular property in question in the suit was concerned, in the zillah of Tanna, the High Court declined to hold "expressly" to mean the same as "actually," as nothing appeared on the face of either of those documents to show where the property mentioned in them was situated.

*A* and *B*, two undivided Hindu brothers, conveyed to their mother, *C*, one-third share in the ancestral property of the family by a deed of sale, dated 29th August 1851. Subsequently, *A* sold his one-third share in the joint ancestral property to *B* by a deed dated the 4th August 1852. In a suit brought by a judgment-creditor of *A* in 1868 to recover *A's* half share in the joint property from *B* and *C*, the plaintiff gave in evidence proceedings taken by *A* jointly with his brother *B* in 1856 against a third person, relating to the joint property, with a view to show that the two documents were illusory, and intended to screen *A's* share from execution by his creditors:

*Held* that such proceedings were important and relevant evidence, in order to test the *bonâ fides* with which *A* executed the two documents, as it was important to ascertain how *A* subsequently demeaned himself with regard to the property, his share or interest in which he purported to convey by those documents. *Girdhar* v. *Ganpat* .....129

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No. XXIX. OF 1827, SEC. 6..... 40

RENT—

An *Inámdár* is not entitled to recover an increased rent if he has given notice of such increase in December 1870 for the current year 1870-71. *Hari Yemáji* v. *Parshrám Gundo*.....23.

*See* INA'MDA'R, 1, 2. JURISDICTION, 3.

REQUISITES OF A PROPER SANCTION FOR PROSECUTION.—*See* PROCEDURE, 6.

RES JUDICATA—

Failure in a suit of simple ejectment does not bar a subsequent suit for redemption, notwithstanding that the defendant had asserted the existence of his mortgage in the former suit. *Shridhar* v. *Náráyan*.....224

RESIDUARIES, SUIT BY.—*See* MUHAMMADAN LAW.

REVENUE SALE.—*See* PROPERTY OF PURCHASER AT REVENUE SALE.

RIGHT OF COUNSEL TO CONDUCT PROSECUTION—

Whether or not a private complainant is permited, under Section 59 of the Code of Criminal Procedure, to conduct a case as prosecutor, he may instruct counsel who shall be entitled to appear, under No. 7, Chap. XI. of the High Court Rules, and the Public Prosecutor may, thereupon, avail himself of the counsel's services under Section 60.

The effect of Section 235 of the Code, read with Sections 59 and 60, is to make every case tried by

the Court of Session a case falling within the provisions of Section 60, that is to say, the Public Prosecutor may always avail himself of the services of counsel retained by a private individual, and in so doing he does not deprive himself of the management of the case.

Where the assistance of counsel has once been accepted, that assistance is not excluded at the stages of the trial (summing up by the Prosecutor and his reply) to which Sections 251 and 252 apply. *In re Nárayan M. Pendshe* .....102

RIGHT OF INAMDA'RS TO RAISE THE ASSESSMENT ON SHILOTRI LANDS.—*See* SHILOTRI LANDS

RIGHTS OF A PREVIOUS MORTGAGEE—

On the 31st August 1863, *A* mortgaged his house to *B*, who brought a foreclosure suit, and, on the 7th July 1866, obtained a decree against *A* for the sale of the house, if the mortgage debt was not paid on or before the 24th March 1868. The debt not having been paid, the house was sold at a court's sale on the 15th July 1870, and purchased by *C*. In an action brought by the plaintiff to recover possession of the house on the ground that he had purchased it on the 2nd August 1868 at an execution sale under a common money decree against *A*:

*Held* that the plaintiff's sale was subject, not only to the mortage of 1863, but also to the decree upon it under which the right, title, and interest of the mortgagor, *A*, passed in 1870 to *C*, whose purchase was entitled to preference to the plaintiff's purchase in 1868.

*Held*, further, that if there had been no decree in the mortgage suit, the fact that that suit had been instituted in 1866, and was pending in 1868, would have been sufficient to defeat the plaintiff's suit; his purchase in 1868 having been made *pendente lite*, was completely subject to any decree which might be made in the mortgage suit. *Rávji Náráyan* v. *Krishnáji*..... .....139

RIGHTS OF PRIOR AND PUISNE ATTACHING CREDITORS—

The fact that a puisne attaching creditor mentioned, in his application for attachment and sale of certain property of his judgment debtor, that the same property had already been attached at the instance of another execution-creditor, does not render the puisne creditor a claimant through the first attaching creditor.

A puisne attaching creditor cannot be regarded as claiming through a prior attaching creditor, though the assignee of an attaching creditor's rights, or the next of kin of a deceased attaching creditor, may be said to claim under or through him. *Bálúji* v. *Gojánan* .....159

RIGHTS OF PRIOR AND PUISNE MORTGAGEE.—*See* MORTGAGE IN GUZERAT.

RIGHTS OF PURCHASERS AT COURT SALES—

The purchaser at a court's sale buys only the then existing right, title, and interest of the judgment-debtor, and, therefore, ordinarily takes subject to the prior right, contingent on confirmation, of a former purchaser, though such former purchase be confirmed subsequently to his own.

*Quære.*—Whether the case might not be different if the delay in the confirmation of the former purchase were accompanied by great lâches on the part of the first purchaser, or by other special circumstances. *Konápá* v. *Janárdan*.....193

SALE.—*See* RIGHTS OF PURCHASERS AT COURT SALES.

SALE OF LAND BY AN INA'MDA'R IN EXECUTION OF A DECREE FOR ARREARS OF REVENUE—

If an *Inámdár* fails to recover his rents by any of the special processes provided in the Regulations and is obliged to go into the civil court and obtain a decree for arrears, the sale of the land in execution of such a decree has the same effect (and not more) as a sale of land in execution of a decree for any other debt. *Báláji Náráyan Kolátkar* v. *Rámchandra Ganesh Kelkar* .....37

SALE PENDENTE LITE.—*See* RIGHTS OF A PREVIOUS MORTGAGEE.

SANCTION FOR PROSECUTION—

When it is intended to charge a person with having made a false statement in the court of a Magistrate or (alternatively) a false statement in the court of a Subordinate Judge, there must be a proper sanction for a prosecution on each branch of the alternative. A sanction for a prosecution under Section 470 of the Criminal Procedure Code must designate the court where the false statement was alleged to have been made and the occasion on which it was committed.

It is desirable, if not necessary, that in the sanction for prosecution the description of the offence intended to be prosecuted should be stated in general terms although details may be omitted. *In re Báláji Sitárám* .....34

SESSION CASE—

To make a case a "session case" within the meaning of Section 4 of the Code of Criminal Procedure, it is not necessary that it should be triable exclusively by the Court of Session.

For the purposes of Section 473 of the Code, an Assistant Session Judge is a different court from the Session Judge. Accordingly, an offence which is committed in contempt of the Session Judge's authority is cognizable by an Assistant Session Judge. *Reg* v. *Gulábdás Kurberdás* .....98

SESSION COURT.—*See* SESSION CASE.

SHILOTRI LANDS—

Government, by an indenture dated the 25th January 1819, conveyed to *A* and B and their heirs and assigns certain villages in the Island of Salsette, with the exception of such spots of *shilotri* tenure as might be therein, or on any part thereof, which could only become the property of *A* and *B*, on their purchasing the same from the proprietors. Since 1819, the holders of these *shilotri* lands had paid to the grantees and their heirs assessment (or rent) at a fixed rate which, before the grant, they used to pay to Government. In an action brought by an heir of *A* and *B*, in 1868, to recover an enhanced rent or assessment levied on these lands:

*Held* that the effect of the exception in the Indenture of 1819 being to throw upon the plaintiff the burden of proving his right to enchance the rent (or revenue), which he had failed to

do, and Regulation I. of 1808, Section 4, clauses 1 and 2, containing admissions by Government (which then was the immediate landlord of the *shilotridárs*), that Government itself had no such right, plaintiff was consequently not entitled to raise the rent.

*Held* also that though the language of the exception was so large that it might have been construed to exclude any right on the part of the grantees to receive rent (or revenue), yet that as the defendant or his predecessors had, ever since 1819, paid to the plaintiff and his predecessors the revenue paid before that time to Government, that revenue passed under the Indenture of 1819 to the grantees in the deed. *Dádibhái* v. *Rámji* .....162

SIGNATURE OF ACCUSED PERSON.—*See* CRIMINAL PROCEDURE CODE, *Sec.* 346. PROCEDURE, 7.

SIGNATURE FOR TESTATOR BY ANOTHER.—*See* ACT X. OF 1865, SEC. 50.

SINGLE ACT AND INTENTION.—*See* CUMULATIVE SENTENCE.

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SPECIAL APPEAL.—*See* JURISDICTION, 3.

STATEMENTS MADE BY PRISONERS DURING POLICE CUSTODY.—*See* ACT I. OF 1872, SEC. 27.

STATEMENTS MADE TO THE POLICE.—*See* CRIMINAL PROCEDURE CODE, SEC. 119.

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1 VIC., CH. 26, SEC. 9.—*See* ACT X. OF 1865, SEC. 50.

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STAY OF EXECUTION.—*See* CIVIL PROCEDURE CODE, SECS. 209 AND 364.

SUBJECT-MATTER OF A SUIT.—*See* SUIT FOR A DECLARATION OF RIGHT TO PROPERTY UNDER ATTACHMENT.

SUCCESSION.—*See* HINDU LAW, 2.

"SUIT"—

An application for execution of a decree being made on the 27th September 1871 :

*Held* not to be a suit within the meaning of Section 1, Clause (a) of Act IX. of 1871, and, therefore, barred under Schedule II., No. 167 of that Act, as having been made more than three years after the date of the last preceding application. *Govind Lashuman* v. *Náráyan Moreshwar*.....111

SUIT AGAINST A MINOR—

Section 2 of Act XX. of 1864 does not prohibit a person having a claim against a minor from bringing a suit until a certificate of administration has been granted. He may properly bring his suit, but immediately after his doing so he should apply to the District Judge for the appointment of an administrator, and it is competent to the District Judge under Section 8 of the Act to make that appointment. *In re Motirám Rupchand* ..... 21

*See* CERTIFICATE FOR ADMINISTRATION, 2.

SUIT BY ONE CO-PARCENER AGAINST THE OTHERS FOR A DECLARATION OF HIS RIGHT TO A GOVERNMENT CASH ALLOWANCE FORMING PART OF THE UNDIVIDED ESTATE. —*See* UNDIVIDED HINDU FAMILY, 1.

SUIT BY A LEGAL SHARER.—*See* MUHAMMADAN LAW.

SUIT BY RESIDUARIES.—*See* MUHAMMADAN LAW.

SUIT FOR A DECLARATION OF RIGHT TO PROPERTY UNDER ATTACHMENT—

In a suit for a declaration that the plaintiff had a right of property and possession in a certain house under attachment, being in effect a suit for the removal of the attachment:

*Held* that the judgment-debt, in respect of which the house was attached, being less than Rs. 5,000, no appeal lay to the High Court.

*Quære.*—Whether the plaintiff, having successfully contended before the Assistant Judge that his plaint was for a declaration of right merely without consequential relief, and therefore properly stamped, could be permitted to say in appeal that the house was the subject-matter of the suit within the meaning of Section 16 of the Bombay Courts Act XIV. of 1869.

The plaint in such a suit as the above, having for its object the relief of the house from attachment, does seek consequential relief. *Motichand* v. *Dádáhái* .....186

SUIT FOR ARREARS OF RENT.—*See* JURISDICTION, 3.

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TENDER OF GOVERNMENT RENT BY DEFAULTER'S MORTGAGEE.—*See* PROPERTY OF PURCHASER AT REVENUE SALE.

TRIAL BY JURY.—*See* ACT I. OF 1872, SEC. 5.

UNDIVIDED HINDU FAMILY—

1. One member of an undivided family cannot sue his co-parceners for a declaration that he is entitled to recover the whole of a family *Varshásan*. The only mode in which, as between the members of the joint family, a declaration of right to the *Varshásan* can be properly obtained, is by one of the co-parceners bringing a suit for partition of the whole of the family estate, including the *Varshásan*, and for a declaration of the shares of the respective co-parceners.—*Trimbak Dixit* v. *Náráyan Dixit*.....69

2. In 1848 two members of an undivided Hindu family mortgaged some land forming a portion of the ancestral estate. The mortgagee, having obtained a decree in 1856 on his mortgage, caused 20 *guntas* of the mortgaged land to be attached and sold on account of the right and interest of one of the mortgagors only on 24th January 1871. In a suit brought by the purchaser against a third member of the undivided family, in whose possession the 20 *guntas* then were, to recover the same from him, as being the property of the mortgagor, whose right and interest therein had been attached and sold:

*Held* 1*st*, that the purchaser could take no more than the share of the co-parcener whose interest alone had been attached and sold, though this share might be defined as it existed at the time of the mortgage made by him in 1848.

2*nd*.—That as between the purchaser and the defendant, in determining whether the latter had

been in sole and exclusive possession for a period sufficient to bar the right of the former, the rule of limitation applicable is that which would have been applied between the co-parcener whose interest had been sold and the defendant, had the former been suing for possession of the land or a portion of it.

3*rd*.—That the share of a co-parcener, being in the estate as a whole and not in any particular part of it, can be ascertained only by taking a general account of the whole estate, and making a distribution in accordance with the results of such account. In taking such account, however, and in making the consequent distribution, it would be only equitable that the share of the co-parcener who affected to deal with a portion of the land as if empowered to mortgage it, should, *ceteris paribus*, if the purchaser takes his place, be so made up as to embrace wholly, or so far as possible, the land which the purchaser bought as belonging to such co-parcener.

4*th*.—That to obtain possession of the land purchased by himself the purchaser must file against the other members of the family a partition suit for the ascertainment of the share of the co-parcener, whose interest he has purchased, as it stood in 1848, and for the allotment to himself of that share so far as it can legally and equitably be identified with the land purchased by himself, and that, consequently, the suit in its present form will not lie. *Púndurang Anandráv* v. *Bhúshar Shadáshiv* .....72

3. In the Bombay Presidency, the share of one of the co-parceners in a Hindu undivided family in the ancestral estate may, before partition, be seized and sold in execution for his separate debt in his lifetime. Such a co-parcener cannot, however, by simple voluntary gift, or by devise, alienate his share to a stranger, so as to bind his surviving co-parceners after his decease.

The purchaser, mortgagee, or other alienee, for valuable consideration, of such an unascertained share, cannot, before partition, insist upon the possession of any particular portion of the undivided family estate.

The mortgagee or purchaser of a share in the undivided ancestral estate of a Hindu family takes such share subject to the prior charges or incumbrances affecting the family estate or that particular share.

If the mortgage or sale be of a special portion of the family property, and possession of such portion can, on partition, be given to the mortgagee or purchaser, without injustice to prior incumbrancers or to co-parceners, it is the duty of the court, making the partition, to give effect to the mortgage or sale, and so to marshal the family property among the co-parceners as to allot that portion, or so much of it as may be just, to the mortgagee or purchaser.

*Quære*.—Whether, in the event of it being impossible, consistently with the rights of others, to give possession of the portion mortgaged or sold to the mortgagee or purchaser, he would be entitled to be recouped out of such other portion as might, on partition, be allotted to the parcener whose share in the special portion had been mortgaged or sold.

The attachment of a parcener's share in the family property under an ordinary money decree should go against the share, right, title, and interest of the judgment-debtor in such parts of the family

property (naming and describing them) as the judgment-creditor can specify, and against his share, right, title, and interest in all other parts of the family property.

The divided share of a Hindu in property which previously belonged to the united family, is, after his decease, and while yet in the hands of his heir, assets for payment of the debts of the deceased.

The whole of the family undivided estate would generally, when in the hands of the sons or grandsons, be liable for the debts of the father or grandfather, and previously to the passing of Bombay Act VII. of 1866, the sons and grandsons, were personally liable for the debts of the father or grandfather, whether they received assets or not. But there is no authority for the converse, viz., that the father or grandfather is responsible for the debts of his son or grandson independently of the receipt of assets, unless he promise payment.

The proposition of Hindu law that debts follow the assets into whosesoever hands they come, must, generally speaking, be confined to separate estate, and the liability of undivided ancestral estate, in the hands of sons and grandsons, to the debts of the father or grandfather is exceptional.

Undivided family property is not, in the hands of surviving co-parceners, generally speaking, liable to the separate debt of a deceased co-parcener.

Where, therefore, a Hindu, undivided in estate from his father, died separately indebted to the plaintiffs, who obtained a decree against the father and wife of the deceased, as his legal heirs and representatives, to recover from the estate and effects of the deceased, the amount of their debt and costs, and sought, in satisfaction of the decree, to attach a shop, which, during the lifetime of the deceased and subsequently to his death, had been in the possession of his father, there being no proof of any separate estate of the deceased having devolved upon his father. *Held* that, though the son was, during his life, jointly interested with his father in the shop as being ancestral property, his rights had come into existence at his birth and died with him, and, therefore, the plaintiffs could not render the shop available for their claim. *Kalyánbhái* v. *Motirám Jamnádás*, 10. Bom. H. C. Rep. 378; *Vásudev Bhat* v. *Venkatesh Sanbháv*, 10 Bom. H. C. Rep. 139; and *Fakirápá* v. *Chanápá*, 10 Bom. H. C. Rep. 162, commented on and distinguished. *Goor Pershad* v. *Sheodin*, 4 N.-W. P. Rep. 137, approved. *Udarám Sitárám* v. *Ránu Pánduji and Venku Pánduji* .....76

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